

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 CASE NO. 08-13555-scc

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5 In the Matter of:

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7 LEHMAN BROTHERS HOLDINGS, INC.,

8 ET AL,

9

10 Debtors.

11 - - - - - x

12

13 U.S. Bankruptcy Court

14 One Bowling Green

15 New York, New York

16

17 April 1, 2014

18 10:05 AM

19

20 B E F O R E :

21 HON. SHELLY C. CHAPMAN

22 U.S. BANKRUPTCY JUDGE

23

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25 ECRO - F. FERGUSON

1 HEARING Re Evidentiary Hearing on RSU Claims

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1 P R O C E E D I N G S

2 THE COURT: All right. Mr. Miller?

3 MR. MILLER: Yes, good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. MILLER: Ralph Miller for Lehman Brothers
6 Holdings, Inc., known as LBHI.

7 Would you like for us to introduce people again
8 this morning?

9 THE COURT: I think everyone can introduce
10 themselves as they rise for the first time. I'm just
11 looking at the telephonic roster here. We are connected,
12 and it looks like I only have Mr. Carragher from Day Pitney
13 on the line representing Fabio Liotti.

14 Is anyone else on the line who wishes to note
15 their appearance?

16 (No response)

17 THE COURT: Okay. I think we're ready to go.

18 MR. MILLER: May it please the Court, Your Honor,
19 good morning, this is Ralph Miller again for LBHI. I did
20 want to introduce who we did have this morning.

21 THE COURT: Okay.

22 MR. MILLER: I believe we previously introduced
23 Mr. Tom Hummel, co-general counsel with Lehman Brothers
24 Holdings, Inc. With him is Mr. Tom --

25 THE COURT: I'm sorry, give me one minute, I'm

1 having a technical issue here.

2 (Pause)

3 MR. MILLER: Also, we have Mr. Tom Beakey (ph)
4 from Alvarez and Marsal who is the person in charge of
5 claims revolution -- resolution essentially by LBHI. We
6 also have some of the people that you met before, Your
7 Honor, Ms. Alvarez and Ms. Brady from Weil Gotshal and also
8 today lastly but not least, my partner Rob Lemons (ph) from
9 our business and management structuring group is here this
10 morning.

11 THE COURT: Okay.

12 MR. MILLER: Your Honor, we would like to begin if
13 we might by getting stipulated in some exhibits that we
14 believe are not questioned about --

15 THE COURT: Sure --

16 MR. MILLER: -- so that we can start with those in
17 the opening if that would be acceptable to the Court.
18 And --

19 THE COURT: I did get some -- there was some late
20 breaking pleadings that I got.

21 MR. MILLER: I think they're stipulations
22 essentially, agreements, Your Honor, on things. And -- but
23 Ms. Alvarez, if she might address the Court on these
24 evidence issues --

25 THE COURT: Sure.

1 MR. MILLER: -- maybe we can make sure that we go
2 smoothly when we do the opening, which is going to be just
3 to clarify for the Court.

4 Basically our case is going to be an annotated
5 opening. I'm going to try to go through --

6 THE COURT: Perfect.

7 MR. MILLER: -- evidence with the Court, and when
8 I'm done with the opening, and subject to any questions,
9 hopefully we'll be finished with the LBHI case, Your Honor.

10 THE COURT: Great.

11 MR. MILLER: And we expect to give you some time
12 back on your three hours this morning, maybe an hour.

13 THE COURT: Okay. I mean, customarily, for better
14 or worse I ask a lot of questions, but because of the highly
15 structured nature of the next couple of days, I'm going to
16 do the best I can to refrain, so I don't cut into anybody's
17 time.

18 MR. MILLER: Well, Your Honor, speaking for
19 myself, we welcome questions.

20 THE COURT: Okay.

21 MR. MILLER: We want to have a dialogue with the
22 Court --

23 THE COURT: Sure.

24 MR. MILLER: -- and these are -- these topics are
25 somewhat -- some of the issues that have come up are

1 nuanced, and we want to make sure we're communicating fully.

2 So please ask any questions that you have, Your Honor.

3 THE COURT: Okay. Will do, that's great.

4 MS. ALVAREZ: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MS. ALVAREZ: We would like to offer into
7 evidence, and I have a list here that I can pass up to you a
8 handful of exhibits at the beginning of our case.

9 THE COURT: Okay.

10 MS. ALVAREZ: They are the stipulation that you
11 mentioned last week you reviewed.

12 THE COURT: Right.

13 MS. ALVAREZ: Which attaches several exhibits, as
14 well as essentially what we refer to as program documents,
15 which are, you know, documents that we distributed to
16 employees every --

17 THE COURT: The organic documents that govern the
18 RSUs and the other compensation units?

19 MS. ALVAREZ: Exactly.

20 THE COURT: Okay.

21 MS. ALVAREZ: And we have an agreement with most
22 of the representative participants as to the admissibility
23 of each of these exhibits. We don't yet have an agreement
24 with the Neuberger claimants. So I don't know if they have
25 an objection, but we'd like to offer these into evidence.

1 THE COURT: All right. Let me hear from -- who's
2 representing the Neuberger?

3 MR. KAPLAN: Eugene Kaplan.

4 THE COURT: Okay, Mr. Kaplan.

5 MR. KAPLAN: Along with Michael Schlesinger
6 representing Neuberger claimants.

7 THE COURT: Okay. What's your objection to the
8 admissibility of this exhibit?

9 MR. KAPLAN: It's not this exhibit. There are two
10 letters at the end of the exhibit list, we object to them on
11 hearsay grounds. They are letters to participants. They're
12 just letters, and we don't know how the out of court
13 statements come in for the truth thereof.

14 And since LBHI has chosen to make a number of
15 hearsay objections to my exhibits, I think what's sauce for
16 the goose is sauce for the gander. I think they are
17 hearsay. They are out of court statements. I assume
18 they're being offered for the truth of the contents of those
19 letters. I'm not objecting to the program documents,
20 although I think that's hearsay as well.

21 MS. ALVAREZ: Your Honor, with regard --

22 THE COURT: So you think the program documents
23 that establish your client's entitlement to any compensation
24 are hearsay?

25 MR. KAPLAN: No, I think my clients are entitled

1 to compensation because their money was taken from them and
2 they did not get it.

3 THE COURT: Okay. Listen, listen, it's nine
4 minutes after 10.

5 MR. KAPLAN: Yes.

6 THE COURT: Okay. I want to keep the blood
7 pressure level down.

8 MR. KAPLAN: Yeah.

9 THE COURT: All right. And I want to stay focused
10 on the legal issues and the facts. I don't need hyperbole,
11 I don't need emotion, I just want to go forward step-by-step
12 and proceed through the next couple of days.

13 MR. KAPLAN: Yes, Your Honor, I understand.

14 THE COURT: So we're not off a good start at this
15 point.

16 MR. KAPLAN: What I said was, I could object on
17 hearsay grounds to the program documents but I'm not. What
18 I'm objecting to are two letters that were sent -- that was
19 sent out to participants, which I see as -- if they're being
20 offered for the truth as hearsay.

21 THE COURT: Ms. Alvarez?

22 MS. ALVAREZ: Yes. I believe he's referring to
23 what we call these "Dear Colleague" letters.

24 THE COURT: The "Dear Colleague" letters?

25 MS. ALVAREZ: The "Dear Colleague" letters --

1 THE COURT: Okay.

2 MS. ALVAREZ: -- that were sent on a yearly basis
3 to employees. They're actually referenced in paragraph 13
4 of the stipulation. Basically they were information packets
5 that were distributed to employees every year, that would
6 include all the program documents attached to them.

7 And in essence, they're not hearsay, and they're
8 really being offered to show the information flow that was
9 given to employees and the information that they received
10 about the program every year.

11 THE COURT: All right. Could I -- do you have an
12 example there?

13 MS. ALVAREZ: Sure.

14 THE COURT: All right. And is it necessary that I
15 make a determination on this issue now before we start?

16 MS. ALVAREZ: It's not absolutely necessary, it
17 would be helpful so that Mr. Miller could refer to these
18 documents in his opening.

19 THE COURT: Well, he can refer to them subject to
20 the -- my considering the hearsay objection, which I'm not
21 inclined to grant, but I'd like to have some time to think
22 about it --

23 MS. ALVAREZ: Sure.

24 THE COURT: -- since this is the first time I'm
25 hearing of it.

1 MS. ALVAREZ: Sure.

2 THE COURT: You're going to have to help me
3 navigate around where you want me to look, to the extent
4 that you're not handing documents up.

5 Is what you're giving me in here --

6 MS. ALVAREZ: Yes.

7 THE COURT: -- because I can --

8 MS. ALVAREZ: Yes.

9 THE COURT: So where is it in --

10 MS. ALVAREZ: What we have -- we also have loose
11 copies, Your Honor.

12 THE COURT: Okay.

13 MR. KAPLAN: Your Honor?

14 THE COURT: Yes.

15 MR. KAPLAN: I've just been handed copies of the
16 letters. These are letters from 1995 that are outside the
17 scope of this hearing. They have nothing -- there are no
18 program documents for those years that are being introduced.

19 So aside from them being hearsay, I would submit
20 that these two letters are not relevant to any of the issues
21 here, and are not accompanied by any of the program
22 documents that LBHI is seeking to introduce. So I had those
23 as additional grounds for my objection.

24 THE COURT: Okay. I've got it, let's keep moving.

25 (Pause)

1 THE COURT: Mr. Miller, the one thing that would
2 be helpful is, and I'm sure you were going to do this anyway
3 is to the extent that you're making arguments, in
4 particular, related to the Neuberger claimants, just give me
5 a heads-up, if and when you do that.

6 MR. MILLER: I will try to do that, Your Honor. I
7 am going to, for clarification, try to move from the general
8 to the specific, and so I'm going to start with some general
9 topics that apply to everyone, and then --

10 THE COURT: Okay.

11 MR. MILLER: -- near the end, I plan to address
12 several of the points that have been raised by claimants,
13 and I'll try to focus there.

14 Perhaps we can go ahead and pass out these
15 notebooks.

16 Your Honor, what we have done is prepared some
17 notebooks, and we have multiple copies, which we'll pass
18 around and have --

19 THE COURT: Right.

20 MR. MILLER: -- documents that have been premarked
21 mostly from the stipulation.

22 THE COURT: Okay.

23 MR. MILLER: And --

24 THE COURT: Just to clarify what everyone's
25 expectation is, generally speaking when -- thank you, when I

1 have a trial of this magnitude with this or a larger volume
2 of exhibits, we have a clear understanding as to what's in
3 the record and the meaning of it being in the record.

4 So I assume it that all of these trial exhibits
5 you folks are treating as being in the record, correct?

6 MR. MILLER: That is what LBHI would like to do,
7 yes, that's our position.

8 THE COURT: Okay. And I'll have to hear from each
9 of the claimants on that. But then there's the next level,
10 which is that as these things go, it's actually not as
11 voluminous as what I get sometimes, but be that as it may,
12 it's difficult, if not impossible for me to read every
13 single page and understand how it fits in. So that it's
14 incumbent upon you folks if there's something on which you
15 specifically intend to rely and I'm opening this binder and
16 seeing you're doing exactly that, that you bring it to my
17 attention. Otherwise, you know, the idea that I'm going to
18 be able to ferret out a particular document and marshal it
19 in support of anyone's position is really a stretch.

20 So in terms of an appellate record, right, what
21 I'm trying to say is that if your agreement is that all of
22 this is in and part of the record, that's fine. But for my
23 purposes in being able to get through this, you're going to
24 need to point out to me either during the course of
25 testimony, presentation of evidence, or argument, specific

1 documents on which you would like me to focus. So does that
2 make sense to folks?

3 MR. MILLER: Your Honor, for LBHI, that's
4 precisely what we plan to be doing.

5 THE COURT: Okay.

6 MR. MILLER: And the notebook you will see are
7 specific documents with highlights on them, and what we're
8 going to do is talk about the highlights.

9 THE COURT: Okay.

10 MR. MILLER: And try to put the highlights in
11 context with the legal issues.

12 THE COURT: Okay. So that just to be clear, just
13 to -- I'd just like to be crystal clear on procedure, so
14 that in the event that there's a document that you haven't
15 brought to my attention and the claimants don't bring to my
16 attention, to the extent that this were going to go up on
17 appeal on an appellate record, it's fair game for the
18 claimants to rely on anything in these books that have been
19 admitted, whether or not anybody brought it to my attention.

20 MR. MILLER: If that's the way the Court wants to
21 proceed, that's fine with me.

22 THE COURT: Well, I'm just try to --

23 MR. MILLER: I mean we --

24 THE COURT: I prefer, I mean, I'm just trying to
25 understand what you folks think it means that these are your

1 trial exhibits, and that they are admissible versus
2 admitted. I'm just trying to clarify what your
3 understanding of what it means.

4 MR. MILLER: For LBHI, Your Honor, we would like
5 to get specifically admitted certain program documents and
6 other documents, especially associated with the stipulation.

7 With regard to other documents, the fact that
8 they've been stipulated to be admissible, we do not
9 understand that they are automatically admitted.

10 THE COURT: That's --

11 MR. MILLER: We just understand that we've agreed
12 that if someone wants to use them, we're not going to fight
13 about them --

14 THE COURT: Okay.

15 MR. MILLER: -- if that distinction is okay.

16 THE COURT: That's fine. So we do have, I think,
17 a lack of clarity as to what the record is going to be when
18 the case leaves here, you know, in the event there's an
19 appeal.

20 So I go with -- when you identify documents and
21 you ask them to be admitted, those are admitted, not the
22 broader universe, unless you're all admitting -- you're all
23 agreeing that they're all admitted.

24 So it would be useful to know what everybody
25 thinks they're doing. Mr. Miller, you've told me what you

1 think you're doing.

2 MS. SCHAGER: Good morning, Your Honor, Richard
3 Schager for the represented plaintiffs. We anticipate that
4 the record on appeal would include the documents to which
5 we've stipulated. My understanding is that we stipulated to
6 the admission of those documents, subject to the Court
7 accepting them, that there would be no objections to
8 admissibility. There might be some objections --

9 THE COURT: But you see, and I regret that we're
10 spending 20 minutes on preliminaries, there's a difference
11 between stipulating and agreeing the admissibility of
12 something, and then the next level being that you actually
13 ask for them to be admitted.

14 So stipulated to and admissibility is great
15 because then we don't have to fight over every document.
16 But if in your case, right, or in your rebuttal -- in your
17 case I'll say, if you want to move the admission of certain
18 documents, you need to do so. In the absence of an
19 agreement that every single document in here is admitted as
20 opposed to simply not objected to.

21 MS. SCHAGER: Your Honor, we move for the
22 admission of the documents that were the subject of the
23 stipulation.

24 THE COURT: Mr. Miller?

25 MR. MILLER: Yes, Your Honor, I was actually going

1 to do the same thing. The stipulation has been marked
2 several places, but the easiest number to remember is
3 Claimant's Exhibit 1. And Claimant's Exhibit 1 has attached
4 to it 21 exhibits.

5 We would agree to the admissibility, for all
6 purposes, of Claimant's Exhibit 1, including the 21 attached
7 exhibits.

8 I believe that's what you want -- right?

9 THE COURT: Claimant's 1 is your declaration?

10 MR. MILLER: No, Claimant's 1, Your Honor, is the
11 stipulation which I believe is attached to my declaration as
12 well, Your Honor, but just for clarity both parties offered
13 the same document, agreed to authenticity. There's a
14 general agreement on authenticity, Your Honor.

15 THE COURT: Well, we're going to have to take a
16 minute for me to understand what you're talking about. I
17 have Claimant's Trial Exhibits Volume I. Is that where I
18 should be looking?

19 MR. MILLER: Yes, Your Honor, if you go to
20 Claimant's Trial Exhibits Volume I, I believe Claimant's
21 CL001 is the stipulation. Is that correct?

22 THE COURT: Claimant's -- CLX001?

23 MR. MILLER: Yes.

24 THE COURT: Is your declaration.

25 MR. MILLER: Okay.

1 MS. ALVAREZ: It's actually, Your Honor, at CL001,
2 which is the joint appendix.

3 THE COURT: Okay. Then I have the --

4 MR. KAPLAN: I beg your pardon, Your Honor, would
5 an ECF number help?

6 THE COURT: No, an ECF number would not help.

7 (Pause)

8 THE COURT: The problem I'm having is that the
9 binders are not organized. These binders are not organized
10 in rationale fashion. But be that as it may, I have -- so I
11 have CL001. It has -- it's hard for me to figure out how
12 many exhibits attached to it.

13 The binder that I have ends at 19, but then it
14 continues on into the other binder.

15 MR. MILLER: If I may request, Your Honor, I do
16 have an excerpt or just the stipulation, we could just mark
17 that as an exhibit, and admit it if the Court would like to.

18 THE COURT: I'm just trying to understand at
19 threshold level what we're doing, what are we talking about.
20 What documents are going to be admitted into the record.

21 MR. KAPLAN: Your Honor, we have the --

22 THE COURT: So, Mr. Miller, your position is that
23 LBHI is going to ask for the admission of the documents that
24 you specifically identified during the course of your
25 argument and presentation?

1 MR. MILLER: Yes, Your Honor, and I believe we've
2 actually passed up -- Ms. Alvarez did this just a moment
3 ago, we've actually passed up a short list of our exhibits
4 that we were moving to admit at this time. I don't think we
5 completed the process of having them admitted.

6 THE COURT: Okay. You can do it at the end of the
7 trial, I'm just trying to understand --

8 MR. MILLER: Yes, Your Honor, we --

9 THE COURT: -- what people think we're doing. So
10 this is the way I'm accustomed to doing it. You proceed
11 through a trial, you identify exhibits either in your
12 argument or through a witness. And at the end, you inform
13 the Court what it is that you want to seek to admit.

14 So what you've said is consonant with what my
15 practice would be.

16 MR. MILLER: Thank you, Your Honor.

17 THE COURT: And then after that, I don't know what
18 we're doing. So I would like to hear from each of the
19 claimants' groups what they think they're doing with respect
20 to the admission of exhibits.

21 Is it your view that all this stuff comes in or
22 not?

23 MR. KAPLAN: Your Honor, we are delighted to
24 follow the procedure you just outlined. I speak for 52 of
25 the represented claimants, and I will let the others address

1 that point, but we're delighted to proceed marking exhibits
2 -- offering exhibits as we proceed.

3 THE COURT: Okay. I'll try it one more time. The
4 reason that you do it at the end of the trial is so that
5 during the course of the trial, every time you refer to an
6 exhibit you do not have to say, I now move for the admission
7 into evidence of this exhibit. So that's why we wait until
8 the end, and I establish at the beginning what the protocol
9 is for the admission into evidence of the exhibits.

10 So is that clear?

11 MR. KAPLAN: Yes, Your Honor.

12 THE COURT: Okay. Does any -- are any of the
13 represented claimants want to file a different procedure or
14 belief that the exhibits ought to be admitted somehow else?

15 (No response)

16 THE COURT: So at the end of the day, I'm going to
17 have lists of exhibits that are admitted into evidence as
18 opposed to merely having been stipulated as to
19 admissibility.

20 Okay. Are we clear now?

21 MR. MILLER: Your Honor, that's clear to LBHI.

22 THE COURT: Okay. Anybody else?

23 MS. SOLOMON: I just wanted to make sure that I
24 was clear as to the procedure, Your Honor --

25 THE COURT: Okay.

1 MS. SOLOMON: -- what I understand is that when we
2 are done with our case, you are simply asking that a list be
3 presented to Your Honor --

4 THE COURT: Yes.

5 MS. SOLOMON: -- on the exhibits that have been
6 admitted?

7 THE COURT: Right. Because when there are
8 voluminous exhibits, sometimes the parties simply agree that
9 everything is admitted, and then for the purposes of a
10 record on appeal, it's all admitted, so that there is a --
11 the specter of something being embedded in a document that
12 no one's referred to, and then a party argues it on appeal,
13 the Court hasn't been pointed to it, so it will not have
14 been addressed.

15 I'm simply trying to avoid unfair surprise, so
16 that everybody understands what the ground rules are, and
17 for me to alert you that you unless specifically point to a
18 document, I'm not going to go through every one of these and
19 ferret them out.

20 So I think we now have an understanding that this
21 is the -- our universe, but at the end of the trial, you
22 will identify the galaxy of exhibits that you want me to
23 consider, and that will be considered part of the record on
24 appeal if there is one.

25 MS. SOLOMON: Makes perfect sense to me, Your

1 Honor.

2 THE COURT: Okay. Twenty-five minutes later I
3 think maybe we have clarity. All right. Okay. I think I'm
4 now ready, Mr. Miller.

5 MR. MILLER: Thank you, Your Honor. May it please
6 the Court.

7 The restricted stock units and contingent stock
8 awards that are at issue in this hearing were always treat
9 as equity in the operative program documents. And they
10 should be classified as equity under this confirmed plan.
11 That is the sole purpose of the proceeding we have today.

12 The claims that have been made are not being
13 denied. The request is to have them classified as claims at
14 the level of equity. As I will explain for the next few
15 minutes, undisputed facts, LBHI believes, demonstrate that
16 two separate provisions of the Bankruptcy Code require these
17 claims to be classified as equity.

18 First, the stock units and stock awards at issue
19 are quote equity securities, close quote, as that term is
20 defined in Section 101.16 of the Bankruptcy Code.

21 Second, under Section 510(b) of the Code, these
22 are all claims for rescission or damages, quote, arising
23 from the purchase or sale, close quote, of a quote, security
24 of the debtor, close quote. And they must be subordinated,
25 therefore, to all claims or interests that are senior to or

1 equal to those securities of the debtor.

2 Now, in this case for 510(b), the security of the
3 debtor is clearly common stock of LBHI. There was never any
4 possibility that these stock awards or stock units would be
5 anything except common stock. There was never any promise
6 that these stock awards or stock units would become debt, or
7 that they would be paid in cash. There are a couple of
8 exceptions on change of control I'm going to talk about,
9 Your Honor, but assuming no change of control, which we did
10 not have here, and there's also an exception for fractional
11 units.

12 So setting aside those two small exceptions, which
13 were essentially for circumstances that don't apply, they
14 were always to become unrestricted common stock. They are
15 almost identical to common stock with one condition, and
16 that is that they are not transferrable.

17 But as will discuss in a moment, Section 101.16 of
18 the Bankruptcy Code specifically says that transferability
19 is not necessary for shares of a corporation to be traded as
20 an equity security.

21 The restricted stock units as we will show Your
22 Honor, had the ability to benefit from dividends on common
23 stock, while those stock awards were maturing and becoming
24 unrestricted.

25 THE COURT: But in the nature of a pick feature,

1 right? In the form of --

2 MR. MILLER: It was -- yes.

3 THE COURT: -- additional units.

4 MR. MILLER: That's correct, Your Honor. It was a
5 payment in kind to the extent that what they got was -- on
6 the day of a dividend, a number of units were computed on
7 that price and they were added to the number of RSUs or
8 CSAs.

9 THE COURT: What triggered a dividend event?

10 MR. MILLER: I believe when the common stock paid.

11 THE COURT: When the common stock paid the --

12 MR. MILLER: If the common stock declared a
13 dividend at a quarterly point, then everybody's -- the
14 computers automatically increase the number of stock units
15 for a value equivalent to that dividend.

16 THE COURT: Based on a current share price?

17 MR. MILLER: Based on the share price at that
18 time.

19 THE COURT: At that time, at that moment.

20 MR. MILLER: Which meant that the value of the
21 RSUs, the number of RSUs actually were shifting based on the
22 movements and dividends of the common stock.

23 The --

24 THE COURT: So if there was a hundred dollar
25 dividend, it would then purchase whatever routable portion

1 -- it would convert that into a number of additional shares,
2 based on some formula?

3 MR. MILLER: Yes, Your Honor, and it included
4 fractional shares as I understand it. It was pretty
5 precise.

6 THE COURT: Okay.

7 MR. MILLER: Also, Your Honor, these shares could
8 vote. There was a trust created. A number of these shares
9 were put in a trust, and I'll go over the proxy in a moment,
10 that told employees how to vote their RSUs and their CSAs.

11 So they had the attributes of ownership that
12 included the ability to vote, the ability to receive
13 dividends, and they were appreciating or depreciating with
14 common stock, because at the end of five years, assuming
15 that the employee had met some relatively standard
16 conditions having to do with duration of employment, having
17 to do with no disparagement of the entity and having to do
18 with not violating non-competition clauses, they
19 automatically dropped away from their restrictions, and they
20 became transferrable common stock.

21 There is a very good summary that I'm going to
22 show it where it is in the documents --

23 THE COURT: Okay.

24 MR. MILLER: -- where the program documents
25 advises the participants, "you can consider the RSUs as

1 shares of Lehman Brothers common stock that the firm holds
2 on your behalf for five years, which you will be entitled to
3 receive at that time, provided you meet certain terms and
4 conditions."

5 I believe that is the best single summary of what
6 these instruments were intended to be and the way that they
7 were described. And I'm going to walk through and show --
8 I'm going to basically do a year in the first year in the
9 life of a typical Lehman employee, and show the
10 communications that they would've received from the
11 beginning, through the end of that year, and then I'm going
12 to do a fast forward five years later and discuss briefly
13 what happened at the end of the fifth year, assuming that
14 the conditions were all met how the stock award or the stock
15 unit automatically became common stock, if you would.

16 And I think this is relevant to a number of the
17 provisions in the statute, and to a number of the sort of
18 supplemental claims that have been made, such as the Wage
19 Act claims, and the economic duress claims. It actually
20 bears on all of those things.

21 Now, the notebooks that we have passed out have
22 highlighted portions, I'm certainly not going to read all of
23 this, and I'm going to start with some legal issues, Your
24 Honor, and then as I say, I'm going to discuss the documents
25 and then I'm going to talk about the Wage Act and some other

1 points. That's how I'd like to organize my turn.

2 Maybe I could start with a little terminology. In
3 the U.S. the term restricted stock units was used.
4 Overseas, the term contingent stock award was used. The
5 documents try to give those almost exactly the same effect,
6 but because of variations in foreign law, for example,
7 German law, and English law, under certain circumstances,
8 there were changes in the contingent stock awards that gave
9 them a little different attribute or taxation consequences
10 or other things, because -- but the U.S. units were all
11 consistent.

12 The vast majority of what we have are the
13 restricted stock units, but there are some claimants with
14 contingent stock awards. I'm going to call them stock units
15 or stock awards for short, but we don't believe that there
16 is any reason frankly to distinguish between those, and we
17 don't think any argument has been made that somehow the
18 overseas units are different from the U.S. units. Except I
19 would point out, Your Honor, that if someone worked in the
20 United Kingdom and they wanted to make a claim, they're
21 probably going to have to deal with wage acts of England,
22 which are addressed in the briefing, and they're not going
23 to be dealing with the Wage Acts of New York. That's, I
24 think, the only significant difference.

25 There are some variations year to year. I'll try

1 to point out some of those. They have been the source of
2 some contention. But in the interest of efficiency, the
3 stipulation used representative documents.

4 We didn't try to put in the documents that were
5 the -- more of the same over the time period over and over
6 again. But we did put in, in some instances, variations
7 where they changed. And I'm going to try to point out as I
8 go through my opening some provisions that were put in, and
9 some provisions that were taken out.

10 And there's one provision in particular I want to
11 provide it to the Court, that dealt with bankruptcy --

12 THE COURT: Right.

13 MR. MILLER: -- that was in its early years, and
14 was removed in some later years --

15 THE COURT: Right, which was the subject of --

16 MR. MILLER: -- and I want to explain --

17 THE COURT: -- some commentary in some of the
18 opposition.

19 MR. MILLER: That's right, Your Honor.

20 THE COURT: So just to make sure that I am clear,
21 we are talking about -- what's the beginning point of the
22 time period that we're talking about?

23 MR. MILLER: 2003, Your Honor. If the five years
24 had passed --

25 THE COURT: Then the stock issued, so we're not --

1 MR. MILLER: If there was common stock --

2 THE COURT: Right.

3 MR. MILLER: -- and whatever happened to the
4 common stock, there's no doubt that that was classified as
5 equity.

6 THE COURT: Right. So if somebody is five year
7 period ran the week before the bankruptcy filing, they don't
8 have -- they wouldn't have an RSU at that moment, they would
9 have stock.

10 MR. MILLER: Yes. And there are -- by the way,
11 retirement, for example, triggered the loss of these
12 restrictions or the removal of restrictions, death,
13 disability. So people could actually have gotten --

14 THE COURT: Okay.

15 MR. MILLER: -- these in shorter periods of time
16 under certain circumstances.

17 THE COURT: And when you're talking about
18 employees who worked for a long period of time, then at the
19 moment of the filing, an employee could conceivably have had
20 stock that issued automatically as you put it, and then
21 still for the five year period leading up to the filing, had
22 RSUs, all issued pursuant to the same program, right, year
23 after year after year?

24 MR. MILLER: Yes. Well, Your Honor, technically
25 they would have a collection of stock units issued each year

1 so they would have some in the 2003 program, 2004 --

2 THE COURT: Right.

3 MR. MILLER: -- 2005, 2006, 2007 and so forth.

4 THE COURT: But they also would have unrestricted
5 stock that --

6 MR. MILLER: If they'd been there long enough,
7 yes.

8 THE COURT: If they'd been there long enough,
9 right, that had been, they hit the five year mark, it
10 converted or issued, whatever the exact term is, and it's
11 stock like any other stock that they could hold that they
12 could trade.

13 MR. MILLER: That's right. And, Your Honor, I
14 don't believe we had any claimants who had said I should've
15 gotten my RSUs on September 1, 2008 turned into stock and I
16 never got my stock. We don't have that here exactly. We do
17 have --

18 THE COURT: But, but --

19 MR. MILLER: -- some people in 2008, and I want to
20 be clear on this, Your Honor, nine of them, who had some
21 commissions that were shown as being for the purchase of
22 RSUs or CSAs, and there was actually a partial issue of RSUs
23 and CSAs in the middle of the year in 2008, that was
24 unusual. It's the only year where that happened.

25 But then they continued to work, and they had some

1 more commissions that were shown as for RSUs and CSAs, and
2 2008, September 15th filing occurred for LBHI, and they
3 never were actually given a certificate or piece of paper
4 that said that they had prior RSUs or CSAs.

5 We are proposing to reclassify those amounts and
6 treat them as equity, as if they had gotten their units.

7 THE COURT: Okay. I guess what I'm focusing on is
8 an employee who had been an employee for a long time, and
9 then at the moment of the filing, had -- will have had
10 received -- say a ten year employee, right?

11 MR. MILLER: Yes, Your Honor.

12 THE COURT: So for the first five years, at the
13 moment of the filing then they have common stock that was
14 issued -- that was born as an RSU, matured, turned into
15 common stock, they took that, they held that they sold it,
16 whatever, and then in the next moment for the next five
17 years, where it hadn't matured yet, it was still an RSU.

18 MR. MILLER: Yes, Your Honor.

19 THE COURT: So RSU pursuant to the same program,
20 the only difference is the timing?

21 MR. MILLER: That would be true, Your Honor. I
22 suppose technically, and I just want to be completely
23 accurately, they probably would not have anything under --
24 from the 2004 program that had matured. They would have
25 something say, from the 2002 program that had matured.

1 THE COURT: Right.

2 MR. MILLER: So they -- but the 2002 and 2004 were
3 not very distinguishable. But they would unrestricted
4 common stock from 2002.

5 THE COURT: Right.

6 MR. MILLER: They would still have restricted
7 stock units from 2003, 2004.

8 THE COURT: I think we're saying the same thing.

9 MR. MILLER: I think we're saying the same thing,
10 I just want to make sure we're communicating, Your Honor.

11 THE COURT: Okay.

12 MR. MILLER: So with that housekeeping out of the
13 way, I want to turn for just a moment to tab 1, which the
14 Court is very familiar with, and that is the definitions in
15 the Code, and the second page of that is the term equity
16 security.

17 Again, I know the Court is familiar with this, but
18 I want to use some terminology and shorthand to refer to
19 some parts of the statute. And, you know, that happens with
20 lawyers live with the statute a long time, we give it
21 shorthand terms.

22 The first subparagraph of Section 16 refers to a
23 share in a corporation whether or not transferrable or
24 denominated stock, or similar security.

25 I submit to Your Honor that the program documents,

1 and we're going to talk about this morning will show, that
2 the stock units and stock awards are shares in the
3 corporation. They are not transferrable, which is okay, and
4 they are not denominated just as stock, they're called stock
5 units and stock awards, but they are similar to a share in a
6 corporation. And that is frankly I believe a complete
7 answer to where we are.

8 Because if that's what they are, they're equity
9 and we don't really need to go any further, the plan treats
10 equity securities in -- like other common stock.

11 Subparagraph C, which has been the subject of more
12 debate has to do with a warrant or right comma, other than a
13 right to convert comma, to purchase, sale, or subscribe to a
14 share, security or interest of a kind specified in
15 subparagraph A or B of this paragraph.

16 Now, the common stock of LBHI was certainly a
17 share in a corporation. So it is clearly within 16(a). And
18 these are certainly rights that have something to do with
19 ending up with a share in LBHI.

20 Now, whether the Court wants to classify them as a
21 warrant or a right, and whether there is a purchase or a
22 subscription, those are frankly sort of semantic issues, and
23 I think they could be characterized as any of those.

24 I do want to point out that there is case law
25 which is in our briefs, that says, that this phrase, other

1 than a right to convert, which has been the source of
2 debate, modifies the word right, not the rest of the
3 section.

4 The legislative history shows that other than a
5 right to convert was dealing with convertible debentures,
6 debt, which could be changed. And the word conversion is
7 occasionally used in the RSU documents. But the operative
8 term here is right, right other than a right to convert.

9 THE COURT: So the intention was to carve out a
10 convertible debenture and to make sure that that was not an
11 equity security, that was a debt security?

12 MR. MILLER: We believe that is what the
13 legislative history shows, Your Honor. And furthermore, we
14 think that the case law is pretty clear that right to
15 convert means an option on the part of the holder, to change
16 it from something to something else.

17 And an action --

18 THE COURT: Isn't that precisely what the
19 claimants are saying, that it's a right to convert it from
20 an RSU to a share of stock?

21 MR. MILLER: They are, Your Honor, but they're
22 saying it converted. But I'm saying it was not a right to
23 convert. They didn't have any optionality unless they
24 wanted to quit working. They didn't have a right to leave
25 it something, they couldn't keep it as an RSU or a CSA like

1 you can a debenture. They did not have the option to change
2 it. It converted automatically. If they were there, it was
3 done, it changed. It was not a right to make a conversion.

4 And I think it's an important point as you go
5 through this, Your Honor, and by the way, there are some tax
6 consequences of this as we will see at the end. They didn't
7 have to pay any tax on this compensation until they got the
8 common stock.

9 If they didn't want the common stock, they could
10 flunk the conditions I guess, they could go out and
11 disparage the company, but the IRS didn't get money from the
12 employees, and it didn't get money -- and there wasn't a
13 deduction to LBHI, as we'll see at the end until it became
14 unrestricted common stock.

15 So they basically were on a track and it was going
16 to become common stock, and if they died, it was common
17 stock, it was in their estate, they had to pay tax on it.
18 So it's not like they had a right or an option to decide
19 whether this became common stock. And there was nothing
20 else they could make it.

21 They couldn't say, we think we'd like to have
22 preferred stock or debt or something else, or leave it
23 something else. RSUs and CSAs could not exist beyond the
24 five years. They either disappeared because the conditions
25 were not met, or they become common stock.

1 And so I believe, Your Honor, that the case law
2 will show, and we think the correct interpretation is that
3 this other than a right to convert does not apply to these
4 programs, when the programs are fully understood.

5 Paragraph -- the second tab, Your Honor, deals
6 with Section 510(b). And I know the Court virtually has
7 memorized Section 510(b), but I do want to talk about some
8 parts of the statute, so again I can refer to them with
9 shorthand later.

10 The Court recognizes that the Enron case dealt
11 with stock options. Now, of course, a stock option, you
12 have to pay more money. And it does have a right to convert
13 to stock. It's a stock auction, and then you pay more
14 money, and then you have a right to convert it to stock. So
15 there was no argument in the Enron case that it might have
16 been an equity security at that time, because it did have a
17 right to convert, and I don't think that's the grounds for
18 Judge Gonzalez. He doesn't say it's an equity security, he
19 doesn't do that analysis as I recall.

20 So we have an additional issue here beyond Exxon,
21 which is, is it just an equity security to begin with.
22 There's no more money paid. The compensation issue, we'll
23 see as we go through these documents, was defined as being
24 payment in RSUs, it's the same thing as paying somebody with
25 room and board, or paying somebody with airline travel

1 rights, or paying somebody with founder stock. I mean their
2 compensation was defined from the very beginning as being
3 partially cash, and partially stock units or stock awards.
4 That was known from the get go, as I will show the Court.

5 So the question is so what is this claim that they
6 are making. Now, the interesting thing is that their claim
7 has sort of evolved. And it started out in the claim world,
8 it seemed to look like damages. That's what essentially
9 Judge Gonzalez was dealing with, it's the second clause,
10 damages arising from the purchase or sale of such a
11 security. And here, the question is, is the -- is such a
12 security it's referring to a security of the debtor.

13 Now, there's two ways that you can actually
14 analyze this here. The security in the debtor is either --
15 the stock unit or the stock award, as I say, in which case,
16 it's probably also a security, or it's the common stock
17 that's going to be unrestricted at the end.

18 But really it turns out now that they are not
19 saying they want their stock. They're saying they want out
20 of the deal. What the briefing now shows is that their
21 argument is, they want their money back.

22 THE COURT: Right. The -- they briefly -- the
23 claimants definitely seem to be taking the position that
24 they have a right to be paid in cash, and that the -- either
25 the failure of the ability to get stock or attain stock

1 that's worth anything gives rise for damages that is not
2 subordinatable under 510(b), that's what seems to be the
3 argument.

4 MR. MILLER: And, Your Honor, I want to make a
5 point that I don't think is in our briefing and as focused
6 away as I would like to, and I want to give Mr. Lemons
7 credit for pointing this out to me very clearly. And that
8 is, although they don't use this word, what they're actually
9 asking for is rescission of the RSU program.

10 What they really want to do is to turn back the
11 clock and say, let's play like this didn't happen, let's set
12 it aside, for economic duress. Let's set it aside for non-
13 disclosure. Let's set it aside because we didn't understand
14 the deal.

15 When one sets aside a deal and gets back their
16 money, and you go back to the beginning, that is rescission.
17 What does Section 510(b) say about rescission, it's very
18 clear?

19 "For the purpose of distribution under this title,
20 a claim arising from rescission of a purchase or sale of a
21 security of the debtor, or an affiliate of the debtor is
22 subordinated." Just like a claim for damages.

23 This was not in the Enron case. This was not in
24 the original briefing. But I suggest to the Court that this
25 is a compelling reason when you understand the claimants'

1 case why subordination is required. They are seeking,
2 although they don't want to call it this, and they're going
3 to tell you I'm sure --

4 THE COURT: Well, with -- not to diminish from the
5 credit you've given Mr. Lemon, it doesn't say a claim
6 arising for rescission of a purchase or sale of a security,
7 it says, a claim arising from rescission, which would
8 suggest to me that somebody did the rescinding and you have
9 a claim on account the fact that somebody rescinded your
10 security.

11 MR. MILLER: Well, Your Honor --

12 THE COURT: Maybe that's kind of the same thing.

13 MR. MILLER: I guess actually, Your Honor, I see
14 it as a two-step process. They are asking the Court to rule
15 that they can rescind the purchase. Then they're saying,
16 the claim they have is for their money back.

17 THE COURT: Yes, okay.

18 MR. MILLER: So that's fine. If the Court decided
19 you are going to rescind, because rescission often requires
20 a judicial action as one knows.

21 THE COURT: Right.

22 MR. MILLER: If you say, okay, it turns out the
23 Neuberger Berman people, for example, were coerced, we don't
24 believe they were for a lot of reasons, Your Honor, that
25 I'll talk about. But let's say that you found that there

1 was economic duress and they were coerced. So they,
2 therefore, entered into an agreement against their will,
3 let's say that part of their compensation would be paid in
4 stock --

5 THE COURT: Right.

6 MR. MILLER: -- and stock awards, you decide to
7 set that aside. You would be rescinding it. Now, they have
8 a claim for their money back. That is a claim for
9 rescission of a purchase or sale of the common stock.

10 THE COURT: Well that -- right. Well, that's --

11 MR. MILLER: They don't want it anymore.

12 THE COURT: That and counsel for Neuberger can
13 address this during this afternoon, but that's exactly the
14 cul de sac that I got myself into when I was going through
15 the Neuberger pleadings. Because even -- exactly as you
16 said, even if I agreed that this was a terribly coercive
17 situation, which, you know, it is what it is, but then I get
18 into 510(b) and I couldn't get myself out of it. So that's
19 something that I'm very interested in.

20 In other words, assuming, you know, the worst or
21 best set of facts, however you want to characterize it, then
22 I still come down to fitting within 510(b). And the analogy
23 that I come to is fraud. What could be worse than that
24 you're defrauded in connection with the purchase or sale of
25 security. And in that situation, which I don't think is

1 what Congress intended to limit 510(b) to, you're still
2 subordinated.

3 So even if you're the victim of a fraud in
4 connection with the purchase or sale of a security, your
5 claim is still subordinated under 510(b).

6 MR. MILLER: Your Honor, I think you're very
7 gracious to call that a cul de sac. I think we view that as
8 a dead end for the argument that they have. I mean, I think
9 there's a way out of that, and that's -- we wanted to
10 suggest that.

11 And I flag that for the Court so that as we move
12 through the documents, you can be looking for the question
13 of whether anybody is saying that any of these promises,
14 provisions, representations were not followed. I don't
15 think they are.

16 THE COURT: Okay.

17 MR. MILLER: What they're saying is, we don't want
18 any of them followed, we don't want stock, the stock's not
19 worth anything, we want to unravel the deal, and go back and
20 we know we worked with the hoax. And by the way, going back
21 to your people who were there for a long period of time,
22 they made a lot of money on the appreciation of Lehman stock
23 up through 2008.

24 It was appreciating all the way up, so they got a
25 lot more money at the end of the five years than they

1 would've gotten, frankly, if they'd taken that and put that
2 in most anything else at that time. So they got the benefit
3 of that. But just like other equity, equity is tied to the
4 fortunes of the business. It rises and falls, and as I
5 would show in the documents in a moment, that was the
6 central purpose of the equity awards program, was to make
7 employees feel like owners of the business, and feel that
8 they were vested in the success or failure of the business.

9 Now, their position is, I think, no one told me
10 that I might have stock worth nothing, but these were people
11 who worked at an investment banking firm, Your Honor. The
12 idea that they didn't understand that stock went up and
13 down, and stock could get to be worth nothing is frankly
14 incredible for all of these employees.

15 We're not talking about people who worked at a big
16 box store. We're talking about people who worked for Lehman
17 Brothers. And most of these people were in the upper
18 reaches of management, as the Court will see. Some of them
19 were very highly compensated by any standard, both in cash
20 and in these units. And to say that they didn't understand
21 that the stock could get to be worth nothing is absolutely
22 an incredible conclusion.

23 So, Your Honor, if I could move now to tab 3.
24 This is -- and this, by the way, is in the stipulation.

25 THE COURT: Okay.

1 MR. MILLER: I believe. Yes. This is a sample
2 employment contract that was selected by agreement for a
3 managing director. It's in CL01 and it's Exhibit 1. And
4 we've highlighted that from the very beginning, employees
5 got letters like this, "We're delighted to confirm our offer
6 of full time employment as the" blank. And then the fourth
7 bullet says, "At the firm's option, a portion of your total
8 compensation (combined base salary, bonus and other
9 compensation) may be payable in the form of restricted stock
10 units pursuant to the firm's employee stock awards program.
11 Please understand that the grant of restricted stock units
12 is subject to the standard terms and provisions of the
13 program."

14 THE COURT: Okay. So walk me through this letter
15 and if I'm a person who received it, I need to understand
16 what I'm getting. So salary at the annualized rate of
17 \$200,000, that's actually cash wages that the person would
18 get in the form of a paycheck?

19 MR. MILLER: Yes.

20 THE COURT: Okay. And then -- because I start
21 with, "We will guarantee you a minimum total compensation of
22 850." So I'm trying to determine what part of that gets
23 paid. The confusing part that I have is that, so you have
24 the \$200,000 which suggests that that was, you know, cash
25 pay.

1 MR. MILLER: It was my understanding is, yes, Your
2 Honor, that was cash pay.

3 THE COURT: Indefeasible just like anybody else
4 would get wages as if they were working in a big box store.
5 Then you have these two bonus numbers.

6 MR. MILLER: Yes, Your Honor.

7 THE COURT: Okay. And so that 200 plus 650 adds
8 up to 850.

9 MR. MILLER: Yes, and then it deals with the next
10 year. This particular letter has a guarantee of a bonus the
11 following year.

12 THE COURT: The following year.

13 MR. MILLER: Yes, Your Honor.

14 THE COURT: Okay. So what does the fourth bullet,
15 the "at the firm's option"?

16 MR. MILLER: What that says, Your Honor, is that
17 some part of this combined base salary, bonus, and other
18 compensation may be payable in the form of restricted stock
19 units pursuant to the plan. And what happened at the end of
20 the year or the bonus, it happened through the year for
21 those who were commissioned, was that a portion, which was
22 determined by the firm of the compensation was paid in the
23 form of stock units or stock awards.

24 THE COURT: But this is the part that I don't
25 understand. I understand that you say to somebody, you're

1 going to get a minimum total compensation of 850, and then
2 it suggests, this suggests that no matter what else happens,
3 you're going to get 200,000 in cash. And then for the 650,
4 we decide how much of that is going to be in cash, and how
5 much is going to be in RSUs. That's what -- is that
6 accurate?

7 I just can't -- I don't understand, were the
8 employees being told that they were at risk at some point of
9 they're used to getting a paycheck in X amount, I don't
10 know, \$200,000, that comes out to be, you know, call it
11 8,000, \$9,000 a month, \$9,500 a month.

12 So were they at risk that at a certain point, that
13 number in their cash paycheck would be lower because someone
14 would have then decided that instead of that cash they're
15 going to get an RSU? I'm just trying to understand what
16 actually happened.

17 MR. MILLER: Yes. Well, Your Honor, I guess we
18 can try to develop those facts as we go through. I don't
19 want to testify.

20 THE COURT: Right.

21 MR. MILLER: My understanding is that the RSUs for
22 employees who had a bonus, always came out of a bonus, they
23 did not come out of the base in practice. I don't know if
24 we've ever had an example where --

25 THE COURT: Because --

1 MR. MILLER: -- anybody said --

2 THE COURT: Right.

3 MR. MILLER: -- that they didn't get their

4 December paycheck because it came in RSUs. I think that --

5 I believe that's the facts, but if somebody knows the

6 situation where --

7 THE COURT: Okay.

8 MR. MILLER: -- a base salary was paid --

9 THE COURT: Right.

10 MR. MILLER: -- in RSUs and CSAs.

11 THE COURT: I mean, this seems -- the fourth
12 bullet that you've highlighted does seem to suggest that the
13 firm could decide whatever it wanted.

14 MR. MILLER: I think it does, yes, Your Honor.
15 But there is a calculation statement. If you want to go to
16 tab 19, Your Honor, in let me see if I can find where that
17 came from.

18 THE COURT: Right.

19 MR. MILLER: That shows a --

20 THE COURT: Right.

21 MR. MILLER: -- calculation example I believe is
22 one of the stipulation documents. Let me make sure that's
23 right, Your Honor.

24 THE COURT: Okay. So that's --

25 MR. MILLER: Tab 19 is --

1 THE COURT: -- exactly --

2 MR. MILLER: -- exhibit --

3 THE COURT: -- what I was thinking. So this shows
4 that you were paid \$200,000, and that you earn a bonus of
5 900, and then it gives you the equity component, and then
6 under the payment, there's an additional cash payment bonus,
7 less RSUs.

8 MR. MILLER: Right.

9 THE COURT: Right.

10 MR. MILLER: This also shows, if you'll note in
11 the middle, an equity summary in U.S. dollars --

12 THE COURT: Right.

13 MR. MILLER: -- RSUs, the equity component is
14 \$235,000 and they added in 2 cents for rounding, market
15 price 126, discount, there's a discount on the RSUs, the
16 stock is actually sold at a discount, which is part of the
17 program. So --

18 THE COURT: So the -- which results in the
19 employee getting more shares than someone would if they were
20 purchasing them on the market.

21 MR. MILLER: Yes, that's correct, Your Honor,
22 think of it like an employee discount on the shares. So
23 they got \$2,486 -- 4,086.7 --

24 THE COURT: Shares.

25 MR. MILLER: -- 7 shares, that's the common stock

1 they will have. They'll have that number of shares at
2 whatever the value of those two thousand --

3 THE COURT: Five years hence.

4 MR. MILLER: -- 486 five years hence, assuming
5 they meet the conditions.

6 And then they also -- there's some notes at the
7 bottom, which we didn't highlight. It says, "All bonus
8 awards and equity awards are contingent on your being
9 employed on the such schedule bonus award date on or before
10 January 31st, 2006," in this case, "and not having given or
11 received notice of employment termination."

12 So, you know, they had to continue to be there.
13 But bear in mind, that the RSUs and the CSAs automatically
14 converted on death, disability and retirement. So this --

15 THE COURT: Okay. That's right.

16 MR. MILLER: These shares could become
17 transferrable, they are shares, they could become
18 transferrable at an earlier date than that for death,
19 disability or retirement.

20 Your Honor, at tab 4 is a different example, also
21 in the stipulation, it's Exhibit 2 to the stipulation of a
22 confirmation employment, and it basically has the same
23 paragraph that you saw before.

24 So we believe that this was consistently given to
25 people in the program.

1 Tab 5, Your Honor, is a document that is in the
2 joint appendix and it's a 2008 U.S. guide to working at
3 Lehman Brothers. It's not -- it's somewhat redundant, but
4 it is helpful at clarifying. One of the thing it states in
5 yellow at the bottom is that the employment is at will. I
6 don't believe there's any dispute about the fact that these
7 were all willing employees. There was no one year term,
8 five year term, whatever.

9 And so if somebody worked a year and they didn't
10 like the way the stock awards and stock units happened, they
11 could quit. I mean, that's an important point in the Enron
12 case, that the employees made the decision everyday whether
13 to continue working on this basis or not, as have all these
14 people.

15 The second page does deal with bonuses, and this
16 stresses that at least at that point, bonuses are at the
17 sole discretion of the firm, with the dates vary from year
18 to year. And it says that they're discretionary unless
19 otherwise agreed upon in writing.

20 You saw two examples of agreed bonuses. Most of
21 these employees, my understanding is, did not have agreed
22 bonuses. They were discretionary. They were usually,
23 frankly, very generous, but they were not agreed to.

24 THE COURT: So when one such employee embarks on
25 the year, they -- it's LBHI's view that then they have some

1 sort of a base salary that they would collect in cash in the
2 form of a paycheck and then at the end of the year, they
3 were just -- they would wait and see what they got in terms
4 of a bonus that could take the form of some combination of
5 cash and RSUs.

6 MR. MILLER: That's correct, Your Honor. And to
7 some extent, I believe it's -- well, that's correct. And
8 you'll notice that this document says that a portion of
9 bonuses may be awarded through the Lehman Brothers equity
10 award program or other firm sponsored programs. That
11 clarifies I think your point that the practice at least was
12 that the stock awards and stock units came out of the bonus,
13 they didn't come out of the base salary.

14 THE COURT: Could you clarify the commission issue
15 for me?

16 MR. MILLER: I'll try, Your Honor. Production
17 based employees, as they call them, were basically sales
18 people.

19 THE COURT: Right.

20 MR. MILLER: They brought in commissions by
21 selling -- getting people to trade with the business, just
22 like stockbrokers, as I understand.

23 THE COURT: Okay.

24 MR. MILLER: And there may be various -- there
25 were a lot of different parts of the Lehman operation. And

1 one of the other things to understand, Your Honor, I'll just
2 mention this for terminology, the only stock in the Lehman
3 system was stock of Lehman Brothers Holdings, Inc.

4 THE COURT: Right.

5 MR. MILLER: It was a -- it was the --

6 THE COURT: Holding company.

7 MR. MILLER: -- parent corporation.

8 THE COURT: Right.

9 MR. MILLER: There were various subsidiaries, some
10 of which were -- had employees, and some of which did not.
11 A major employer was Lehman Brothers, Inc., LBI, which was
12 the broker dealer, which has gone through a SIPA proceeding.

13 We have a note at the end of our brief that if
14 these claims turned out to be claims for money instead of
15 claims for stock, many of these claims would be claims
16 against Lehman Brothers, Inc. for money in the SIPA
17 proceeding, and not claims against LBHI.

18 So I just want to note that for the Court's --

19 THE COURT: Understood.

20 MR. MILLER: -- understanding. But LBHI is
21 dealing with the stock issues because this was where all the
22 stock --

23 THE COURT: Right --

24 MR. MILLER: -- was.

25 THE COURT: -- but what I'm focusing on is the

1 idea that we -- that some of the claimants were --

2 MR. MILLER: Yes, let me go back to the
3 commission.

4 THE COURT: -- commissioned. Okay.

5 MR. MILLER: Regardless of which entity they were
6 selling for, a portion of their commissions, and I believe
7 they were monthly commission statements, would have an
8 allocation to stock awards or stock units. And that portion
9 was allocated out of their commissions. And at the end of
10 the year, that portion was converted just like you saw into
11 tracking --

12 THE COURT: So was there an understanding at the
13 outset that, and I'll make up a simple example, if you sell
14 a hundred dollars' worth of a mortgage, whatever it was that
15 they were selling, or stocks, trades, however you
16 characterize it, you will receive a commission of 1 percent.
17 Is that -- I mean, how was the commission -- what was the
18 understanding as to how the employee would earn the notional
19 amount of the commission, putting to one side for the
20 moment, the form in which that commission, the compensation,
21 would be paid?

22 MR. MILLER: Well, Your Honor, you're going to
23 have some people testify, I think there were variations on
24 this.

25 THE COURT: Okay.

1 MR. MILLER: But my understanding is that yes,
2 there was a percentage, but there was also, I believe in the
3 employment arrangement, a very similar clause to the one
4 that is -- that we're seeing here, that says "a portion of
5 your commissions may be paid in the form of equity awards."

6 So from the very beginning there was an
7 understanding. And I believe the testimony will --

8 THE COURT: So the commission --

9 MR. MILLER: -- be common in this industry.

10 THE COURT: -- the rate of commission and the --
11 I'll say the rate of the commission was known, but the form
12 in which it would be paid was subject to this discretionary
13 allocation.

14 MR. MILLER: That is my understanding, Your Honor.
15 And, you know, we -- I don't want --

16 THE COURT: I appreciate that.

17 MR. MILLER: -- to proffer that because it varies.

18 THE COURT: Yeah.

19 MR. MILLER: But, yes, that's my understanding.

20 THE COURT: Okay.

21 MR. MILLER: Is that that did vary, and I think,
22 in any event, that's the case, Your Honor.

23 Moving through some more of sort of the known
24 issues, at tab 6, Your Honor, is an excerpt from the
25 stipulation itself, and we use that just to show that the

1 employee handbook, this is on page 4 for UK employees, had
2 almost exactly the same sort of statement, "At the firm's
3 discretion, a portion of your total compensation under any
4 discretionary bonus award may be made in the form of
5 contingent stock award, CSAs, under the appropriate Lehman
6 Brothers stock awards program."

7 We're just sort of showing that this sort of
8 statement was present in documents we think in all the
9 programs.

10 Tab 7 I want to flag for the Court as one that
11 there's been an objection made to as hearsay. We're not
12 offering tab 7, Your Honor, to -- for the truth of the
13 matter asserted. We are offering it as an example of the
14 format of communication. I believe that there will be
15 testimony that a "Dear Colleague" letter of some kind came
16 in basically every year. And it had a series of attachments
17 to it.

18 The letter itself is not important. The idea is,
19 at the end of the year, or the middle of the year, that they
20 got some things that had the stuff we're going to talk about
21 later attached in some form.

22 Tab 10 is a useful example of the stock incentive
23 plan prospectus. And this, among other things, states the
24 purpose of the plan, which is one of the things that we
25 think is relevant to the Court's consideration as to whether

1 this is equity or something other than equity. And the
2 highlight on page 2 at tab 10 says, "The purpose of the plan
3 is to strengthen holdings," that's LBHI, "by providing
4 incentive to such participants to encourage them to devote
5 their abilities to increase stockholder value and to sustain
6 excellence."

7 This theme runs throughout, that the purpose of
8 this was to create a sense of equity that is ownership in
9 the firm.

10 Now, page 5, and these are excerpts, Your Honor,
11 there were pages in the exhibit. It's page 5 of -- on the
12 bottom. It says, and this is another important theme, with
13 respect --

14 THE COURT: Are we still on the same exhibit, I'm
15 sorry?

16 MR. MILLER: Yes, Your Honor --

17 THE COURT: Oh, it's --

18 MR. MILLER: -- still at tab 10.

19 THE COURT: I got it.

20 MR. MILLER: "With respect to any RSUs granted
21 under the plan, the obligations of the company are limited
22 solely to the delivery of shares of common stock on the date
23 when such shares of common stock are due to be delivered
24 under each award agreement. And in no event, will the
25 company become obligated to pay cash in respect of such

1 obligation."

2 Then it has a paren that has to do with fractional
3 units. Parenthesis, "except that the company may pay the
4 participant amounts in cash in respect of an RSU equal the
5 cash dividends paid to the holder of the same number of
6 shares of common stock that are subject to RSUs for
7 fractional shares or any amounts payable in cash upon the
8 occurrence of a change in control."

9 So the exceptions really are that they could pay
10 cash dividends if they wished, and they didn't have to pick,
11 and they could pay for fractional shares, or for any amount
12 payable in cash upon the occurrence of a change in control.

13 So this important because, Your Honor, there's --
14 throughout the plan documents, you will see there are a
15 number of statements that the only obligation of the company
16 is to deliver common stock. It was never to deliver
17 anything else, it was never to deliver cash, it was never a
18 right to back out, there was never a right for a refund,
19 there was never a warranty. This is a program of -- as you
20 said, they start out as stock awards or stock units, and
21 they grow up to be common stock, and they can't change to
22 something else. And they never have a right to -- they
23 never have a money back guarantee.

24 Tab 11 is another program document. This is
25 important because it is amended through November 8, 2007.

1 So this was up through basically less than a year before the
2 Lehman bankruptcy. And I think it's -- and it had all the
3 amendments, and it tended to be cumulative.

4 Again it states the purpose. "The purpose of
5 Lehman Brothers Holdings, Inc. employee incentive plan, 'the
6 plan', is to strengthen Lehman Brother Holdings, Inc. by
7 providing selected employees of the company with the
8 opportunity to acquire a proprietary and vested interest in
9 the growth and performance of the company, thus generating
10 an increased incentive to contribute to the company's future
11 success and prosperity."

12 It goes on, and it's not highlighted, and says,
13 "enhancing the value of the company for the benefit of
14 stockholders, and enhancing the company's ability to attract
15 and retain individuals of exceptional talent."

16 So this had multiple programs, but they were all
17 key -- the program had multiple purposes, but they were all
18 keyed to promoting a proprietary perspective.

19 The bottom of this page notes that the plan should
20 be administered by the committee. There's a committee
21 established, "which shall have the power to select those
22 participants who shall receive awards, and to determine the
23 terms of such awards."

24 This is an important point, Your Honor, because in
25 some instances you may hear some testimony from somebody who

1 says, my boss explained something to me about this plan.
2 The documents always said, the committee sets the terms of
3 the plan. And it was clear that there was nobody who had
4 authority in Lehman to go around and make up equity awards
5 programs.

6 THE COURT: So -- but wouldn't any such testimony
7 be inadmissible and hearsay anyway?

8 MR. MILLER: Well, yes, Your Honor, although some
9 people may say this was my state of mind. I mean, that's
10 what their -- they may use it. So I'm just making clear --

11 THE COURT: Okay.

12 MR. MILLER: -- that we don't believe that the
13 terms of this program could be varied by representations of
14 anybody. It could only be varied by the plan committee.
15 That's the way the structure was, and everybody was told
16 that to begin with.

17 The top of this page numbered 4 still in tab 11
18 repeats --

19 THE COURT: Stop on that point. So in the
20 hypothetical, I know what the document says, but my boss sat
21 me down and told me, don't worry, we'll pay you in cash.
22 Don't I get to the same cul de sac that I'm in with respect
23 to Neuberger then? In other words --

24 MR. MILLER: Sure. I think you do exactly, Your
25 Honor. I mean, the answer is okay, so if they say, I kept

1 working because my boss told me to do this, otherwise I
2 wouldn't have worked, so now I want cash instead, they want
3 to rescind the deal, because they say it wasn't the deal
4 they thought it was, we're back to a rescission, and we're
5 back to a rescission of something else.

6 And again, we don't believe that that's going to
7 actually happen, but I do want to flag for the Court that
8 there are a number of places in the program documents, where
9 they say only the committee could change the plan. And
10 everything is communicated in writing, you will see that
11 here.

12 Page 4 is another repetition of the same, the
13 obligations to the company, and any subsidiary, limited
14 solely to delivery of common stock. And it has these same
15 exceptions about certain times that there are payments.

16 THE COURT: And -- but there was an allegation in
17 one of the claimant's briefs that -- about the removal of
18 the language, specifically referring to subordination in the
19 event of a bankruptcy.

20 MR. MILLER: I'm going to come to that in a couple
21 of tabs, Your Honor.

22 THE COURT: Okay. I'll wait, I'll wait.

23 MR. MILLER: But you're right --

24 THE COURT: Yep.

25 MR. MILLER: -- that is true, and I want to deal

1 with that.

2 THE COURT: Okay.

3 MR. MILLER: I can skip to it now if you want me
4 to but --

5 THE COURT: No, no, that's fine.

6 MR. MILLER: -- I think it'll be in order and
7 it'll be a little clearer.

8 THE COURT: That's fine, I'm going to start
9 keeping quiet again.

10 MR. MILLER: No, Your Honor, I want to answer the
11 questions.

12 Section 9 is another statement about dividends
13 made at the discretion of the committee, it can provide the
14 participant with dividends or dividend equivalents and
15 voting rights prior to either vesting or earn-out. Vesting
16 and earn-out are terms that were used to refer to these
17 awards. And my understanding is that consistently
18 throughout the time period at issue, the committee did grant
19 dividend equivalence and did grant voting, some voting
20 rights at least.

21 Now, there is a clause at the bottom of 4 that the
22 participants like to emphasize, and I want to talk about the
23 clauses they like, as well as the clauses that we like.

24 This says, "The grant of an award shall not be
25 construed as giving a participant the rights of a

1 stockholder of common stock unless and until shares of
2 common stock have been issued to participants pursuant to
3 awards hereunder."

4 Now, that's obviously a legal boilerplate
5 statement, I can do some hypotheticals. For example, I
6 don't think a holder of a stock award could bring a
7 shareholder's derivative --

8 THE COURT: Derivative action, right.

9 MR. MILLER: I don't believe that they could go to
10 a shareholder's meeting and offer a motion, if that's all
11 they had. So they are not an active shareholder, but they
12 do have attributes, I believe, of shares in the corporation.

13 Now, this is another clause on page 5 that the
14 participants place some emphasis on, and it goes back to the
15 exceptions really that I talked about before. They say it's
16 an unfunded status of the plan.

17 "Since the plan is intended to constitute an
18 'unfunded' plan for long term incentive compensation with
19 respect to any payments not yet made to a participant." Now
20 this is payments not yet made to a participant, "including
21 any participant optionee by the company, nothing herein
22 shall give any participant any rights that are greater than
23 those of a general creditor of the company."

24 Now, Your Honor, the way that payments could
25 occur, if we went back to the exceptions here on the prior

1 page, they could occur if the committee decided to pay
2 dividends as money. Payments could occur if they wanted to
3 pay for fractional shares, or payments could occur if there
4 was a change in control.

5 In those circumstances, these would be payments as
6 general creditors, and as the Court knows, compensation of
7 employees actually gets a priority for \$10,000 and certain
8 amount that varies, I think this is intended to say that
9 those particular payments are not necessarily in that
10 priority. You don't have to deal with that, because that's
11 not one of the issues before you.

12 But I would suggest to you that this clause does
13 not mean that there was ever a right to get money back.
14 This is just saying that if a payment became due under one
15 of these exceptions, it was just general creditor status, it
16 was not preferred payment.

17 THE COURT: I'm sorry, I lost you. What payment
18 would be entitled to general creditor status?

19 MR. MILLER: If you went back to the prior page,
20 subparagraph B, it said, "with respect to any restricted
21 stock units granted under the plan, the obligations of the
22 company or subsidiary are limited solely to delivery of
23 shares of common stock."

24 Now, skip down to a parenthesis, which says,
25 "except that the company or any subsidiary may pay to

1 participant amounts in cash in respect of restrictive stock
2 units, equal to cash dividends, paid to a holder of shares
3 of common stock, for fractional shares or for any amounts
4 payable in cash upon the occurrence of a change in control."

5 Those are three exceptions when cash could become
6 payable to someone under the RSU program, and if you imagine
7 that a bankruptcy curtain fell between say a change of
8 control and the payment of amounts of money due under the
9 change of control, there would be amounts payable under the
10 program, but those amounts would be at the general creditor
11 level under this statement.

12 They're saying, the only reason that this clause
13 on page 5 could have existed, was if they were going to have
14 some right to get our money back, or that this means we
15 should have a right to get our money back. And I'm
16 suggesting to the Court in context, this is a legalistic
17 provision that is designed to say, yes, there may be amounts
18 of money due at certain times, very limited times, not times
19 at issue with this Court, and if that happens, they're
20 general creditors.

21 So I want to flag that, because I don't think this
22 means what the claimants are going to say it means, and I
23 wanted to put it in perspective for the Court.

24 I will note, by the way, that there's also, and
25 it's not highlighted --

1 THE COURT: Well, read the next sentence in that
2 section 16 and --

3 MR. MILLER: Section 16, Your Honor?

4 THE COURT: Yeah.

5 MR. MILLER: Yes, I --

6 THE COURT: "In its sole discretion, the committee
7 may authorize the creation of trust or other arrangements to
8 meet the obligations created under the plan to deliver
9 common stock or payments in lieu thereof."

10 So at least at first blush, that would appear
11 to --

12 MR. MILLER: Well --

13 THE COURT: -- support your reading, but I'm not
14 entirely certain.

15 MR. MILLER: Well, yes --

16 THE COURT: In other words, because it -- you're
17 talking -- when you think of unfunded, you think of
18 unfunded, and here it's talking about the delivery of common
19 stock or payments. So it's distinguishing between two types
20 of units of compensation or kinds of compensation that
21 haven't been paid. The phrase "or payments in lieu thereof"
22 is what I'm focusing on.

23 MR. MILLER: Your Honor, I think we -- and we can
24 maybe explore this a little later, if you have the entire
25 document, you'll find that this document deals with stock

1 options and it deals with other incentive awards. And there
2 was a number of kinds of equity awards that are not at issue
3 here today, Your Honor.

4 THE COURT: Okay.

5 MR. MILLER: But the restricted stock units are
6 for this purpose. I do want to mention the trust briefly.

7 There was a trust created. It held shares of
8 common stock primarily. Sometimes it held little amounts of
9 money that were being used to buy common stock. Well, what
10 the company did was it bought common stock, and put it in
11 trust.

12 THE COURT: Okay. So now you're getting to my
13 point. So in that sense, it was funded.

14 MR. MILLER: It was funded by stock.

15 THE COURT: By stock that was issued and
16 outstanding and that was --

17 MR. MILLER: That's correct, Your Honor.

18 THE COURT: -- and it was placed aside so that
19 when an RSU matured, so to speak, it then became stock that
20 that employee held.

21 MR. MILLER: That's correct, Your Honor, and there
22 is some documents dealing with the trust.

23 THE COURT: Okay.

24 MR. MILLER: And that is the stock, by the way,
25 that the RSU holders voted. They could direct, as you will

1 see in a moment in the proxy. The holders of stock units
2 and stock awards could direct the trustee to vote their
3 number of shares in favor of something, or against
4 something. So that's how they got their voting rights. Is
5 that they maintained voting control over that --

6 THE COURT: So it's kind of like --

7 MR. MILLER: -- the stock --

8 THE COURT: -- they acted as certificate holders
9 in some kind of an CMBS trust. They directed the trustee to
10 vote on their behalf.

11 MR. MILLER: That's correct, Your Honor, and again
12 I'll come to that in just a moment in the tabs.

13 THE COURT: Okay.

14 MR. MILLER: So tab 12, Your Honor, is a 2003
15 equity award program, and this happens to be for a senior
16 vice-president. There were different programs for different
17 employment positions, but they were generally very similar.

18 This is one of the documents in the stipulation.
19 It's Exhibit 3 to the stipulation.

20 This is another good summary on the first page,
21 "Each RSU represents the conditional right to receive one
22 share of Lehman Brothers common stock five years after the
23 RSU is granted, assuming continued employment with the
24 firm."

25 And then it goes on and says, "once your RSUs

1 convert to common stock, they become freely tradable. They
2 cannot be sold, traded, pledged, or assigned before
3 conversion."

4 So the term conversion was used, Your Honor, but
5 it was an automatic conversion, it wasn't a right to
6 convert. It happened automatically.

7 Now, the second page of tab 12 has two quotes that
8 again I think are a good summary of the purpose of the
9 program, and what the participants understood. The first
10 highlight says "the program provides you with an incentive
11 to think and act like an owner every day, and allows you to
12 share in the firm's financial success over time." That is
13 really the core of the way you'll see this program was set
14 up. They felt like an owner. They could vote, they got
15 dividends, and at the end of five years if they were still
16 working there, they got the right to buy -- to sell their
17 common stock.

18 Then this is a quote I used earlier, "You can
19 consider the RSUs as shares of Lehman Brothers' common stock
20 that the firm holds on your behalf for five years, which you
21 will be entitled to receive at that time, provided you meet
22 certain terms and conditions."

23 There is at the -- if you go over a couple of
24 pages, there is a sample calculation page. I don't think we
25 need to dwell on that, but this is helpful to the Court to

1 understand this sort of information is what was provided to
2 the program participants. So if this was their first year,
3 they could see what their compensation statement was going
4 to look at I believe, or this is similar to the calculation
5 that was done.

6 The next page, Your Honor, has two important
7 points I've referred to, death, disability and retirement.
8 "Upon death, disability or retirement, the entire principal
9 portion and discount portion will vest immediately and
10 shares of Lehman Brothers' common stock will be issued
11 immediately."

12 So these people understood that their estate had
13 shares of common stock, another attribute of ownership.

14 Now, there's a discussion of tax treatment on the
15 next page, and I'm not going to read all of it, but briefly
16 under the tax regulations, the employees were not taxed
17 until they convert to common stock, so they appreciate on a
18 pre-tax basis for the five year period, which is a benefit.
19 And there is a summary of taxation rules on this page.

20 The last --

21 THE COURT: I'm just pausing on your statement
22 they appreciate on the pre-tax basis. So in the year in
23 which the RSU is issued, if it has a notional value of
24 \$500,000, there's no tax on that.

25 MR. MILLER: Well, I think the point is if one had

1 common stock and you wanted to sell the common stock or you
2 got the dividends, for example, on common stock, you pay tax
3 on the dividends, and then you wouldn't have a tax that you
4 could reinvest somewhere else.

5 They appreciate and there's no tax on the
6 appreciation. If the appreciation goes up, and the
7 appreciation goes down, the employees don't pay tax on it
8 when it goes up.

9 THE COURT: So let's take an example.

10 MR. MILLER: They only pay tax when --

11 THE COURT: So they get \$500,000 of RSUs or RSUs
12 convertible at that price, \$500,000. Then over the five
13 years it appreciates to a million dollars. Okay.

14 MR. MILLER: Yes, Your Honor.

15 THE COURT: So in the fifth year, they get Lehman
16 stock worth a million dollars. That's their tax event.

17 MR. MILLER: Right.

18 THE COURT: A million dollars of non-capital gains
19 on the five -- they didn't pay tax on the 500, so they're
20 not paying tax on the gain, they're just getting ordinary
21 income of a million dollars when they get the stock in five
22 years?

23 MR. MILLER: I'm not sure whether it's all
24 ordinary income or not, Your Honor, but they -- it is all
25 taxed at that point, where you go back to send them a tax.

1 MS. BRADY: Four, Your Honor, that's a special
2 permission --

3 MR. MILLER: Stand up and identify yourself,
4 please, this is Ms. Brady and she's going to --

5 MS. BRADY: Your Honor, Teresa Brady.

6 THE COURT: Thank you.

7 MS. BRADY: If you see on page 11 here, there are
8 tax considerations. There's a block discussion RSUs. In
9 the fourth bullet, it says "special provisions dealing with
10 capital gains will not apply upon conversion."

11 THE COURT: So that's consistent with --

12 MR. MILLER: Yes, that's consistent with what
13 you --

14 THE COURT: -- what you're saying, Mr. Miller, is
15 that there was no tax event when the RSUs are issued. The
16 tax event is when the stock issues and when the stock
17 issues, you have a tax event, but it's not a capital gain.

18 MR. MILLER: That's correct, Your Honor.

19 THE COURT: Okay.

20 MR. MILLER: But they also have not had to pay tax
21 on an appreciation if the stock has gone up --

22 THE COURT: Right. Well, that would be --

23 MR. MILLER: -- and then the stock --

24 THE COURT: -- if you got \$500,000 in stock, so
25 that would be income to you that would be taxed, and then if

1 you sold the stock five years later for twice, then you
2 would have -- you know, all other things being equal, a
3 capital gain.

4 MR. MILLER: Yes, Your Honor.

5 THE COURT: So. Okay.

6 MR. MILLER: The last page in tab 12 is dividend
7 equivalents. And it says dividend equivalents approved
8 quarterly on your RSUs and are reinvested as additional RSUs
9 without a discount. It's worth noting the dividends are not
10 paid on stock option awards. There are some stock option
11 awards, Your Honor, but they didn't get dividends.

12 And then voting rights, and this explains the
13 voting rights a little bit more. "Lehman Brothers
14 established a trust and funded it with shares for your
15 benefit, to provide you with voting rights related to RSU
16 awards. You will be able to direct the voting related to
17 shares held in the trust in proportion to the number of RSUs
18 you hold."

19 And then tab 13 is a proxy statement dealing with
20 the voting issue, Your Honor. And if you flip over, this
21 happens to be February 2003 again, we believe this is a
22 representative sample.

23 It says, "proxies furnished to company employees
24 also indicate the number of shares, if any, and it says,
25 that relate to the total number of restricted stock units

1 granted to the employee pursuant to various of the company's
2 incentive plans as defined below, which shares are held in
3 part in the 1997 trust under Lehman Brothers Holdings, Inc.
4 incentive plans."

5 And then if you skip down to the next highlight,
6 "Proxies returned by employees holding restricted stock
7 units related to shares held in the incentive plan trust
8 will be considered to be voting instructions returned to the
9 incentive plan trust trustee, with a defined term, with
10 respect to the number of shares determined pursuant to the
11 terms of the agreement governing incentive plan's trust as
12 described below under the voting spot."

13 And then I'm -- we don't need to read the next
14 highlight, but it explains how this works.

15 Now, I do want to be clear, Your Honor, the trust
16 did not necessarily have a share for every RSU that had been
17 issued. So this is a proportional thing. The voting rights
18 were not necessarily exactly the same voting rights, one-to-
19 one. I want to be clear about that, but there were voting
20 rights, and they did -- the voting rights depended upon how
21 much was in the trust.

22 THE COURT: Could Lehman have issued the RSUs
23 without any voting rights whatsoever?

24 MR. MILLER: It could've designed the plan that
25 way I'm sure, Your Honor. We don't know of any reason it

1 didn't have to. I think the -- my understanding from the
2 plan documents is that the belief was that giving holders of
3 stock units and stock awards voting rights increased their
4 feeling of ownership and participation. And I think it is
5 another one of those attributes that makes it look like more
6 shares of a corporation.

7 I mean, one of the most important rights of a
8 shareholder in a corporation is the franchise. And this
9 gives them a form of franchise. So I think when you're
10 looking at the -- sort if it walks like a duck, quacks like
11 a duck test, this is something that is more like shares of
12 the corporation --

13 THE COURT: Okay.

14 MR. MILLER: -- and therefore, it's important.

15 If you -- tab 14 is one of those -- one of the two
16 documents that I'm going to talk about that have to do with
17 this provision that was included and then taken out dealing
18 with bankruptcy.

19 And so I want to focus the Court's attention on
20 that, and let's talk about it at this point. This is the
21 2003 program I think -- let me make sure this is part of the
22 -- yes, this is Exhibit 4 to the stipulation, Your Honor.
23 And we've highlighted some sections. There is a general
24 rule, an entitlement to receive common stock, and it simply
25 makes the statement "unless otherwise set forth herein, you

1 shall receive one share of common stock for each unit which
2 you hold on November 30th, 2008, on maturity date."

3 So this established that in 2003, the maturity
4 date was November 30th of 2008. We know September 15th was
5 the filing. So nothing in the 2003 plan or later would've
6 reached the maturity date.

7 The occurrence of bankruptcy is dealt with in
8 subparagraph G, and it is also discussed on the next page,
9 treatment in bankruptcy. And this paragraph G says that "if
10 there is an occurrence of a bankruptcy distribution event,
11 or death or disability, then all outstanding units held by
12 you shall become immediately payable, and you shall, as soon
13 as practical thereafter, receive freely transferrable shares
14 of common stock."

15 Again, what this says is, in a bankruptcy, what
16 you get is common stock. It doesn't say in a bankruptcy you
17 get cash, it doesn't say anything different from what we're
18 saying here. And I don't believe anybody here is
19 complaining that they want to be sure they have common
20 stock. They do have, they will have after reclassification
21 their proportioned interest in the equity pool.

22 And while it is really hard to imagine how this
23 could happen, but in theory, if somewhere in the archives it
24 turns out that Lehman Brothers Holdings, Inc. holds the
25 patent on cold fusion, and it turns out that billions of

1 dollars pour in from an unexpected source, they will get
2 shareholder distributions if the plan has to be revised, and
3 there is -- you know, if we pay off all our debts.

4 And by the way, a number of Lehman subsidiaries
5 have actually paid all their unsecured creditors, and are
6 moving into the mode where they've been dealing with post-
7 petition interest and other things. But they might have
8 some shareholder benefits if they had shareholders. They
9 won't.

10 THE COURT: Can you -- I'm just -- the -- what I'm
11 staring at is the introductory phrase in G. And it says,
12 "Notwithstanding the provisions of paragraphs 4(b), (c), (d)
13 and (e)." So the entire paragraph is qualified by that.
14 And (b), (c), (d) and (e) all have to do with terminations.

15 So I'm trying to understand why it says that, as
16 opposed to notwithstanding 4(a).

17 MR. MILLER: Well, Your Honor, I think 4(b), (c),
18 (d) and (e) are the -- are essentially the keep working here
19 and don't compete conditions. And I think -- we're
20 speculating now, but I think the idea here is that if a
21 bankruptcy is looming, the employees ought to be free to go
22 ahead and find other jobs and maybe compete, and that their
23 stock units should not have been cut off for that.

24 That seems -- I don't think that has anything to
25 do with where we are here, but I think that was the idea if

1 there was going to be a scramble.

2 Now, I'm going to suggest in a few moments, Your
3 Honor, you've anticipated one of my points. This paragraph
4 is fairly unworkable if you actually examine and think about
5 it. Because if the company is moving into bankruptcy, the
6 idea of running around and issuing a bunch of shares of
7 common stock to people in a big hurry doesn't make a lot of
8 sense. Because what we now know about bankruptcy, and it's
9 demonstrated here and other things, is there's a stay,
10 everything has to be sorted out, and equity is one of the
11 last things dealt with.

12 So I'm going to suggest to you that one of the
13 reasons these bankruptcy provisions were eliminated, is
14 because they were actually unworkable and unnecessary. But
15 I'm anticipating that. But if you think about what somebody
16 must have been thinking about here, that's probably what
17 they were.

18 THE COURT: This -- I hear you. I guess what, the
19 more interesting one is the treatment in bankruptcy
20 provision.

21 MR. MILLER: Yes, Your Honor.

22 THE COURT: You're going to get to that, so I'll
23 wait.

24 MR. MILLER: All right. Well, Your Honor, what
25 this says essentially, as you know, is if you're an

1 employee, that you receive a subordinated -- you receive
2 shares of common stock, and until grant, you shall be deemed
3 in the event of a bankruptcy of holdings, to be claims for
4 damages arising from the purchase or sale of common stock of
5 holdings within the meaning of Section 510(b) of the
6 Bankruptcy Code, and shall have in such bankruptcy the same
7 priority as, and no greater priority than the common stock
8 interest and holdings.

9 THE COURT: Right.

10 MR. MILLER: Basically it says what we're saying
11 here.

12 THE COURT: What the law is, right.

13 MR. MILLER: It is, by the way, it's a statement
14 of the law.

15 THE COURT: Right.

16 MR. MILLER: It says, what you will -- what will
17 happen under 510(b). It's not actually a subordination
18 agreement. It doesn't say you agree that, it says, this is
19 what's going to happen under 510(b), which is basically we
20 think the correct statement of the law.

21 THE COURT: Right.

22 MR. MILLER: And then it says that the terms can
23 be amended from time to time.

24 Now, let's compare that with tab 15, which I
25 believe actually tab 15 has the same provisions in it. Tab

1 15 is another of the --

2 THE COURT: Same year.

3 MR. MILLER: Same year, same provision. Let's go
4 to 2005.

5 THE COURT: Right.

6 MR. MILLER: In 2005, we have the same essential
7 document, but it doesn't talk about bankruptcy at all.

8 THE COURT: At all. It takes it out of the --

9 MR. MILLER: It just takes it out.

10 Now, Your Honor, I'll represent, and I have an
11 expert on this, that we have tried hard to find a living
12 human being who knows why this change was made, and we have
13 failed. And we have a long litany of the efforts we have
14 made. No one knows why it was removed.

15 We do know that there was, and we believe that the
16 evidence will show, there was no public announcement of the
17 removal of this provision. There was no publicity
18 associated with the removal of this provision.

19 Now, I would suggest several --

20 THE COURT: Is there something, and I'm totally
21 speculating just as a bankruptcy junkie, right, 2005 was the
22 enactment of BAPSPA. Maybe, you know, maybe some bankruptcy
23 lawyer decided -- maybe someone read it and made some
24 determination, but I'm just speculating.

25 MR. MILLER: Well, Your Honor, we believe that

1 there were changes in the tax law, there were changes in the
2 bankruptcy law.

3 THE COURT: Right.

4 MR. MILLER: I believe the most logical inference
5 is someone said, look, this might be wrong, this might be
6 confusing, this is not a pleasant subject, why should we
7 even bring up bankruptcy, why do we need to give legal
8 advice to people in this document, and somebody said well,
9 let's take it out, let's not talk about it this year, and it
10 was scratched out. I believe that's the most logical
11 conclusion.

12 THE COURT: So nobody either side has any evidence
13 of why -- what occasioned the removal of the language?

14 MR. MILLER: I believe that's the case. Now, Your
15 Honor, I'd also point out --

16 THE COURT: So the claimants are asking for an
17 inference though that it reflects a change in the
18 substantive treatment that the rights of the RSUs is
19 entitled to.

20 MR. MILLER: Right, Your Honor. And as you
21 consider that argument, I just want -- let's play out what
22 we've seen about the purposes of this program.

23 The purpose of this program are to incent
24 employees, to make them feel like owners, and to make them
25 want to keep working for the company. If this were a change

1 hypothetically, it would seem this would be a huge positive
2 that would want to be announced to the other employees, and
3 tell them, look, you're the only firm in Wall Street that
4 has a program that says, if we go bankrupt, we're going to
5 pay you back all the money that's tied up in your RSUs.
6 That could've doubled recruiting, Your Honor.

7 I mean, nobody to our knowledge has that kind of a
8 provision. But I -- this is in the famous Sherlock Holmes
9 dog that did not bark, there is no crowing or announcement
10 or pride that says there's any change in the program. It's
11 just that this legalistic explanation disappears.

12 So we suggest to Your Honor at the hearing, at the
13 end, you're not going to have any evidence that this removal
14 means anything. It just is a non-event. And that I think
15 is -- that's our position, obviously you'll listen to the
16 evidence, you'll (sic) see what the Court thinks.

17 But I think these documents frame that issue, and
18 the Court can see it's the same story except bankruptcy has
19 disappeared.

20 And by the way, I would note in tab 16, death or
21 disability is still here. Those provisions are still
22 recognized.

23 Going to move more quickly and then we're going to
24 skip some of the tabs, Your Honor, because I do want to
25 talk, and I don't know if the Court is going to want to take

1 any break.

2 THE COURT: I'm okay without a break, but if
3 anybody wants to step out for a break, you're absolutely
4 welcome, even if you're sitting at counsel table. I just
5 think it's important to keep going so we can use the time as
6 best we can.

7 MR. MILLER: That's fine, Your Honor, I am --

8 THE COURT: If you'd like to take a break, Mr.
9 Miller, that's fine.

10 MR. MILLER: No, no, I'm fine, I was going to -- I
11 don't want to make an estimate on time, because I'm
12 notoriously bad at that, Your Honor.

13 THE COURT: All lawyers are notoriously at time
14 estimates, so.

15 MR. MILLER: But we are moving right along here.

16 THE COURT: Okay.

17 MR. MILLER: Tab 18, Your Honor, is an excerpt
18 from the stipulation. This is another calculation example,
19 I'll just offer it to the Court to explain how the RSUs were
20 deducted and how they were calculated. Tab 19 we've
21 actually already looked at, so we don't need to spend more
22 time with that.

23 We are not going to look at in any detail tabs 21
24 or 22, those are some numbers that might be useful in cross-
25 examination or for some other purpose later.

1 Tab 23, I would direct the Court's attention to,
2 the last one, and the last page there is a summary of who
3 the taxation effect occurred for LBHI with regard to this.
4 There's actually discussion which you've seen before of how
5 the taxation occurred for the employee in the stipulation as
6 well. That's above it in that page.

7 This says, that once an RSU or CSA converted to
8 common stock, LBHI was entitled to and did, in fact, claim a
9 U.S. federal income tax deduction, as compensation spents
10 (ph) subject to any other limitations as may have been
11 required under federal, state, and local income tax laws for
12 the then prevailing amount or value of the award in the year
13 of payment to such employee.

14 The amount of such income tax deduction will be
15 based on the market price of the LBHI common stock as
16 quoted, on the New York Stock Exchange as of the
17 delivery/release date and deducted in the same taxable year.

18 This is one of a couple of important pieces of
19 evidence that the value of RSUs and CSAs for virtually all
20 purposes was variable and unpredictable.

21 THE COURT: But -- so let me focus on this,
22 because my recollection is that there was some argument in
23 the claimants' papers, although I could be wrong, that
24 somehow Lehman was gaming the tax benefit of this.

25 So -- perhaps gaming is a poor choice of words,

1 but in other words, the argument would be, look, Lehman took
2 a tax deduction for the compensation in year one, even
3 though year -- it did not -- it was not payable to the
4 employee until year five. And what this says is the
5 opposite of that.

6 MR. MILLER: That's correct, Your Honor. That
7 corrects this notion. There was some -- some arguments were
8 made at one point in the briefing that this was
9 asymmetrical.

10 THE COURT: Right, right.

11 MR. MILLER: That it was a deduction to Lehman
12 before -- for tax purposes before it was a --

13 THE COURT: So they got the benefit of the --

14 MR. MILLER: Before they got the benefit.

15 THE COURT: The argument was, they got the benefit
16 of the deduction at the outset, not at the back end.

17 MR. MILLER: Right. This is a little bit of a cul
18 de sac, Your Honor, but I will mention in the Emert (ph)
19 deposition, which was a 30(b)(6) deposition, there was some
20 discussion about how accounting entries moved around with
21 regard to the grant of RSUs, and of course, they had to be
22 accounted for in some way.

23 Essentially all that moved around in the equity
24 portion of the balance sheet, and it didn't have tax
25 consequences. And so Lehman did have to record compensation

1 expense for shareholder reporting. It was not hiding it for
2 earnings purposes, but it didn't get the tax deduction until
3 later. So there was a separation. And there's a federal --
4 there were federal tax guidelines that govern employee
5 equity awards, as you might imagine. And Lehman tried, and
6 we believed complied, as far as we know, fully with those.

7 So the tax consequences were handled as described
8 here, and that's in the stipulation, Your Honor.

9 So if I might turn now and change subjects a
10 little bit, and I want to talk -- summarize what we've
11 talked about, and then talk about some of the other claims
12 that have been raised.

13 To summarize, these documents have shown that
14 employees were told they would be compensated in part with
15 stock units and stock awards if they chose to work at
16 Lehman. The stock units and awards had many of the
17 characteristics of stock, they could be voted, they got the
18 benefit of dividends, and they increased or decreased in
19 value precisely with the value of common stock.

20 When the transaction restrictions were removed and
21 the unrestricted common stock was delivered, the employee
22 paid tax on the value of the common stock at that time, and
23 the company took a tax deduction for that employee expense
24 at that time. And both of those events were based on the
25 price of the shares at that time, up, down, worth a lot,

1 worth nothing, whatever happened.

2 So this really did function as quote, shares of
3 common stock that Lehman held on behalf of employees for
4 five years and then delivered it when conditions were met.

5 There's nothing in these documents that ever gave
6 employees a right to get their money back if the stock went
7 down in value or if Lehman went into bankruptcy. When there
8 were any bankruptcy provisions, they just said, we'll hurry
9 up and give you the common stock.

10 There is nothing that told employees exactly how
11 many of the stock units -- how much the stock units or stock
12 awards ultimately --

13 THE COURT: You know, now that you're -- now that
14 you've just said that again, again this is speculation, but
15 I'm wondering if one of the reasons that that didn't work,
16 was that it might have been viewed as a preference.

17 MR. MILLER: It could've been, Your Honor.

18 THE COURT: An acceleration of a right to receive
19 payment upon a bankruptcy that somebody might have decided
20 would be a preference in some manner. But again, just
21 bankruptcy junkie speculation.

22 MR. MILLER: There's a lot of good reasons,
23 frankly, Your Honor, to remove summaries of the law that are
24 unnecessary on documents, and that's what this was. It was
25 a summary of the law, and so we don't believe that it has

1 any significance, but Your Honor will decide what the law
2 is.

3 And one of the things that of course the Court
4 recognizes is, 510(b) is mandatory. So even if there had
5 been some effort to contract around 510(b), we -- there's a
6 good deal of doubt as to how that could've possibly been
7 done. So I do want to mention that, to deal with the same
8 issue we were talking about.

9 Continuing, Your Honor, the present claims as I
10 have said can be characterized either as claims for equity
11 securities, or they can be characterized as claims for
12 rescission or damages for the purchase of Lehman common
13 stock.

14 Now, I want to talk about the Wage Act and
15 economic coercion. There are, of course, Wage Acts from a
16 number of states. The vast majority of these employees
17 would be under the New York Wage Act we believe. And this
18 is covered in our opening briefs on pages 30 through 34, and
19 covered in our reply on pages 30 through 38. But the best
20 short answer is that wages are designed to deal with
21 quantifiable amounts of compensation.

22 And the value of a stock unit or stock award is
23 not quantifiable because it depends on the stock price five
24 years in the future, and nobody can predict stock use five
25 years in the future -- stock price. And the Guiry, G-u-i-r-

1 y, Guiry versus Goldman Sachs case, which is discussed in
2 both briefs is squarely on point. It's from the first
3 department in New York, it dealt with RSUs and it said that
4 RSU claims are not for wages, because quote, ultimate value
5 of the equity based compensation, close quote, depends on
6 the quote, stock price after the rights vested at the time
7 of delivery, close quote.

8 The Wage Acts and we can spend more time with
9 this, were historically having to do with hidden deductions.
10 Somebody was promised that they would make a hundred dollars
11 a week, and they got their paycheck, and they had \$10 taken
12 out for uniforms, and they'd had \$15 taken out for lunch,
13 and they got a check for \$75.

14 THE COURT: But isn't that like what arguments
15 that at least some of the claimants make here?

16 MR. MILLER: That's what they're trying to do,
17 Your Honor, is to make those arguments. But the point that
18 I am -- the key point under the law is that that does not
19 apply to something where they were told, you will receive an
20 indeterminate right in value in return for your
21 compensation. And it turns out that that indeterminate
22 right is not worth as much as they hoped it was going to be
23 worth. Because you can't -- you don't have the element of
24 certainty that it's required for those to be wages.

25 Wages are not compensation of some form. And you

1 can take -- there's a lot of examples of this. An airlines
2 pays its employees in airline travel awards. And it goes
3 broke and it can't deliver on the awards. It's pretty clear
4 that those are not wages. They were travel awards, they
5 might be worth nothing, they might be worth something or a
6 lot, depends on all kinds of things.

7 Or stock is a classic example, if someone is paid
8 in stock, and that stock goes down, even if they don't get
9 it right away, it's not wages. And so we think it's quite
10 clear that -- and the Guiry case deals with this, that
11 something that could be worth nothing is not wages. It may
12 be something else, but it's not wages, so the Wage Acts
13 don't apply.

14 THE COURT: This is not a claim then that if
15 somebody says Lehman promised to pay me \$200,000 in cash,
16 and then four months in, I got a notice that said, instead
17 of the cash that you were supposed to be paid this month,
18 we're withholding half of it, and we're going to pay you
19 later in stock. That's not what occurred here, correct?

20 MR. MILLER: That's correct, Your Honor, because
21 the documents always said that a portion, which we will
22 decide and tell you later, is going to be paid in stock.
23 And --

24 THE COURT: Of your entire compensation, not just
25 your base or not just your bonus.

1 MR. MILLER: Right.

2 THE COURT: Not just your bonus, but also
3 including your base.

4 MR. MILLER: That's correct, Your Honor. And --

5 THE COURT: So somebody could've gotten such a
6 phone call or notice and that would've been part of the
7 program you say.

8 MR. MILLER: That's correct, Your Honor. It was
9 an understanding they had going in, that part of what they
10 were paying -- and the other answer is, Your Honor, they --
11 what they were promised was to be paid in stock units and
12 stock awards, and they got paid in what was promised.

13 If somebody had been paid and say a place to live,
14 and they got offered a place to live, and they chose not to
15 live there, they were paid. It wasn't that part of their
16 wages. If they didn't like the place to live or they didn't
17 want it, or it turned out not to be as nice, that doesn't
18 change the fact that they were paid with what they had
19 agreed they would be paid with.

20 I would point out by the way, this is essentially
21 the same law in other states and in the United Kingdom, and
22 we have a discussion of English law, which has to do with
23 the concept of quantified wages, that wages have to be
24 quantifiable as a precise sum. And if part of the agreement
25 is something that's not quantifiable, it's not a Wage Act

1 issue. It may be something else, but it's not a Wage Act
2 issue.

3 And by the way, if they did have a Wage Act claim,
4 it would also be subordinated. Because it would also be --
5 it would be for damages related to the purchase of a
6 security. So it actually --

7 THE COURT: As opposed to an employee who had a
8 compensation arrangement for \$200,000 cash pay all year, and
9 Lehman in the chaos leading to the filing, didn't issue a
10 check.

11 MR. MILLER: That's correct, Your Honor.

12 THE COURT: That would be a wage claim, that would
13 be either entitled to priority or would be an unsecured
14 claim on a pari passu with any other general unsecured
15 creditor.

16 MR. MILLER: Yes, Your Honor, and that might have
17 a priority for --

18 THE COURT: Some of it.

19 MR. MILLER: -- compensation.

20 THE COURT: Right.

21 MR. MILLER: But that would be -- that's correct,
22 Your Honor. But the thing that makes these Wage Act claims
23 subordinatable, if they were Wage Act claims, because
24 subordination does not say claims under federal law is all
25 that's governing, state law, any kind of state securities

1 laws, whatever it is, these are arising from a claim for
2 rescission or purchase of securities. They're all mixed up
3 with Lehman common stock, and those are securities of the
4 debtor.

5 THE COURT: Okay.

6 MR. MILLER: There's no doubt about that. So they
7 all have to do with people who are the debtor level.
8 They're not general unsecured creditors. And I think
9 there's a pivot point in bankruptcy between general
10 creditors who don't have the insight, don't choose to deal
11 with a business with the knowledge and people who are on the
12 equity side of that business who buy stock and get paid in
13 stock, who deal with stock. And these people were on the
14 equity side of that pivot point because they were employees,
15 they understood they were going to be in the stockholding
16 business.

17 And I might add, Your Honor, there's also
18 limitations problems with most of these Wage Act claims,
19 because they weren't brought with -- most of them were not
20 brought within the limitations period. Because Wage Act
21 claims are something that people have to assert pretty
22 quickly. They're not something that can be brought years
23 later.

24 So we believe that the Wage Act, although it's
25 creative, it is simply -- the Wage Acts are not an issue

1 that present any determinative analysis here.

2 And economic duress, we've already talked about a
3 little bit. First of all, economic duress, we would believe
4 here would probably have to be done under New York law,
5 because almost all these communications were with New York,
6 but it's very difficult to prove.

7 It requires a threat of an unlawful act that
8 compels performance. And it also requires prompt complaints
9 about the duress. The prompt complaint issue is actually a
10 complete answer to the whole economic duress issue. Nobody
11 complained about this duress, anything like
12 contemporaneously or shortly thereafter. It was only after
13 they got into this proceeding, years later, and lawyers got
14 involved, that somebody decided that they were going to
15 assert economic duress claims.

16 And as we will show you, when we get to cross-
17 examine some of these people, the people who are putting the
18 most emphasis and this is directed at Neuberger Berman, were
19 people who were receiving, in most instances, multiple
20 millions of dollars a year in cash, and multiple millions of
21 dollars a year in stock awards.

22 And the idea that they came in and said, you know,
23 I want all my money in cash now, I don't want to keep
24 working here, their real economic duress argument is, I
25 couldn't make nearly as much money anywhere else, so I had

1 to keep working here. That's really the ultimate Neuberger
2 Berman argument.

3 This was so -- this was just so much money that I
4 was going to make here, compared to what I could make
5 anywhere else, that I had to keep working here. And it is
6 -- you will see that the restrictive covenants from
7 Neuberger Berman are very reasonable. And reasonableness,
8 as the Court may know, is the test of lawfulness for
9 restrictive covenants. They were one year covenants, they
10 were tied back to things like use of information, contacting
11 clients, dealing with people that they had dealt with
12 before.

13 Now, they're going to say, well, gee, I'm not any
14 good in the industry if I can't go back and try and use the
15 same clients or the same information for a year, but that's
16 -- those are completely appropriate restrictive economic
17 covenants. And they didn't have to enter into them again
18 when -- they were all at will employees. If they wanted to
19 go out and get some new clients, or they wanted to go out
20 and take another job, they were certainly free to do that.
21 Nobody -- there was no two year term, three year term of
22 continued employment. There was no ability to make them sit
23 on the sidelines here generally. It's just they're saying,
24 which, you know, I can't take my clients with me, and I want
25 to own these clients. That's going to turn out to be the

1 Neuberger Berman argument we believe.

2 And we don't think that's economic duress. And we
3 don't think it meets any of the standards. And because
4 there was no prompt complaint, it also doesn't constitute
5 economic duress.

6 But above all, the remedy for economic duress is
7 rescission of the agreement. The remedy is that the
8 agreement is set aside and whatever was put into the
9 agreement is given back to the people that went into the
10 agreement and didn't want to make that payment, and now they
11 say they were forced to do it.

12 And rescission of this agreement, which is an
13 agreement to work for stock awards or stock units in part,
14 is subordinated under 510(b) as the first condition. So
15 it's that cul de sac that you referred to, and we think that
16 it's a complete answer to the Neuberger Berman arguments.

17 I think we have also talked about the issues about
18 the subordination clause, as they like to call it, which it
19 really isn't. It's really a summary of 510(b) and
20 bankruptcy law, which was removed. And I think we have
21 dealt with all of the issues that have been raised by the
22 claimants, but we obviously will see how the case emerges.

23 We believe that the program documents and the
24 undisputed facts lead to the inescapable conclusion that
25 likely 3,500 claims that have already been reclassified

1 without opposition, these 200 plus claims should be
2 reclassified as equity.

3 THE COURT: Okay. So that's the entire -- you've
4 taken up two hours and five minutes of the allotted three
5 hours, is that --

6 MR. MILLER: That's correct, Your Honor. Other
7 than offering exhibits for admissibility, which maybe we're
8 going to do at the end of the case --

9 THE COURT: Right.

10 MR. MILLER: -- this -- I want to confer with my
11 lawyers and make sure I haven't missed --

12 THE COURT: Concludes -- would conclude your --
13 the opening segment.

14 MR. MILLER: Yes. I think this concludes our
15 opening statement.

16 THE COURT: Okay.

17 (Pause)

18 MR. MILLER: Ms. Alvarez makes one point that I do
19 want to stress, I think the Court knows it, but one of the
20 arguments that is being made here is that there was no
21 purchase involved --

22 THE COURT: Yes.

23 MR. MILLER: -- with these securities. And the
24 Enron case, and other cases in our brief make the point that
25 agreement to work for stock or equity or conditional equity

1 is a form of purchase.

2 THE COURT: Purchase, yes.

3 MR. MILLER: That these parties agreed, I will
4 work, like the signs, we'll work for food, we'll work for
5 stock. And that's a purchase.

6 THE COURT: Okay.

7 MR. MILLER: And I think that's clear but I wanted
8 to --

9 THE COURT: I think that point was made very
10 clearly.

11 MR. MILLER: I did want to make that point. Thank
12 you, Your Honor. At this -- based on that, our opening is
13 completed, Your Honor.

14 THE COURT: All right. So let me ask the -- all
15 of you what you'd like to do in terms of the next session.
16 We had when we thought it would take three hours, we had
17 said we would go from 10 to 1, at least this was at the
18 pretrial, we said we'd go from 10 to 1 and then from 2 to 5,
19 but we're now at 7 minutes after 12. So my preference would
20 certainly be to take an hour and resume and finish early for
21 the day.

22 So I'm seeing a lot of nods, so no objections to
23 doing that?

24 (No response)

25 THE COURT: All right. So why don't we round up,

1 and why don't we say we're going to resume at 1:15 for the
2 next three hour segment. And you're welcome, of course, to
3 leave all your things in the courtroom. All right. Thank
4 you very much.

5 (Recessed at 12:09 p.m.; reconvened at 1:24 p.m.)

6 THE COURT: All right, I'm ready when you are.
7 Who am I going to hear from first, Ms. Solomon?

8 MS. SOLOMON: Yes, Your Honor.

9 THE COURT: Okay.

10 (Pause)

11 THE COURT: All right, let me just check to make
12 sure that we're okay in terms of those folks who are
13 participating on the phone.

14 If you can't hear us well enough the best way to
15 communicate that is to contact chambers and we'll do the
16 best that we can.

17 One thing that we need to make sure we do is at
18 the podium there's one of these nice new microphones that do
19 a good job of picking up all the sound, but at counsel table
20 they're the old fashion ones, so if folks are speaking from
21 counsel tables just try to pull that microphone towards you,
22 because that's the occasion when people on the phone are
23 unable to hear you and they get frustrated.

24 So, okay, I'm ready when you are.

25 MS. SOLOMON: Very good, Your Honor. Thank you.

1 Your Honor, I'd like to really keep this as simple
2 as possible.

3 THE COURT: Okay.

4 MS. SOLOMON: What I intend to do is start out
5 with what the test is in this circuit for subordination
6 under 510(b) of the Bankruptcy Code and what it is not, and
7 then proceed from there as to the particular elements and
8 requirements of 510(b), security, damages, and purchase of
9 such a security arising from the purchase and sale, and
10 that, Your Honor, will take me to two doctrines that we
11 primarily rely upon here. Alternative performance and the
12 wage loss.

13 Your Honor, as to the test in the circuit for
14 subordination there is not much dispute about it. The
15 Second Circuit set forth it very clearly in the Med
16 Diversified case. There in a case involving fraudulent
17 inducement and breach of contract the Court stated that
18 510(b) was proper, quote, "only if the claimant took on the
19 risk and return expectations of a shareholder rather than a
20 creditor."

21 Judge Gropper in the CIT case affirmed by the
22 Second Circuit read Med Diversified and in a consistent
23 manner in his decision he wrote, quote, "The reason question
24 is whether the claimant bargained for the risks and rewards
25 of a holder of equity rather than a holder of the debt."

1 That's the test. Did you bargain for the risk and
2 rewards of an equity holder rather than the holder of a
3 debt?

4 It's not the same as a but for test, it's not the
5 same as a causal connection test, and it's not the same as a
6 nexus test. Because if that was the case, Your Honor, then
7 Judge Gropper in CIT could not have found the way he did
8 with regard to a divestiture of stock of the debtor, and
9 there he held that a tax agreement that was entered into in
10 connection with the stock agreement was not subject to a
11 subordination.

12 He expressly rejected the nexus test in CIT, and
13 he stated:

14 "There's no question that the tax agreement has a
15 nexus to the IPO and that both were agreed to in connection
16 with the spin off of CIT from Tyco.

17 As the foregoing cases demonstrate however, the
18 existence of a mere connection between the claim and the
19 purchase and sale of a security is not enough to support a
20 finding that the claim arises from the purchase or sale and
21 should be subordinated unless the purposes of the statute
22 would be served thereby." Close quote.

23 That's the test in this circuit, Your Honor. It's
24 not a but for test and it's not a nexus test. The test very
25 clearly is did you bargain for the risks and returns of an

1 equity holder?

2 Now let's turn to the facts of this case. The
3 compensation claimants or the claimants in this litigation
4 came to Lehman over a number of years. Some of them came to
5 Lehman prior to 1994 when the -- which I'll refer to as the
6 RSU program -- was implemented by Lehman some time mid year,
7 and there were various compensation claimants that came to
8 Lehman after 1994 over various years.

9 What were they told? Well, Your Honor, some of
10 the submissions this morning as well as the submissions in
11 connection with our brief lay out that they were not told
12 very much. What they were told though was that in each year
13 you may or you may not get some of your compensation in what
14 was ultimately going to be the issuance of stock equity.

15 THE COURT: Well, let me just stop you at they
16 weren't told very much, because the documents that were
17 referenced this morning had a lot of different components.
18 They had -- and I'm generalizing, perhaps over generalizing,
19 but just to talk about basic principals.

20 So there were in some instances the dear colleague
21 letter, in some instances -- and that attached the
22 management ownership plan, there was is stock incentive
23 plan, there was the Lehman Brothers Holding employee
24 incentive plan, there was the what I would call the plain
25 English/glossy version, for example, at tab 12, the 2003

1 equity award program. So I don't think I would characterize
2 that as not much.

3 What they weren't told was with precision how much
4 of their compensation would be paid in the form of these
5 restricted stock units about which they were told quite a
6 lot. It's just the not much I think only relates to the
7 toggle, if you will, between cash/cash and compensation
8 payable in the form of RSU.

9 So I'm just pushing back on your statement that
10 they weren't told too much.

11 MS. SOLOMON: Understood, Your Honor, and let me
12 back up a little bit.

13 There was a stock incentive plan that was there,
14 but what were they exactly told when they were hired,
15 assuming these were even people who were hired after 1994?

16 Your Honor yourself questioned the employment
17 agreement that we looked at earlier this morning, and it
18 appears that in each year prior to the rendition of services
19 they were not told that any of their compensation would
20 eventually be paid in equity through the devices of RSUs.
21 There was no statement whatsoever to the employees. It was
22 left up to the discretion of Lehman, and it was not a case
23 as in the case of Enron where employees were told at the
24 outset a certain minimum amount of your compensation you are
25 going to receive in equity through the devices of these

1 RSUs.

2 THE COURT: But again, I'm going to keep going
3 back to this. If you look at tab 3 in Mr. Miller's binder,
4 which is a dear colleague letter dated 1999, it clearly
5 says, "At the firm's option a portion of your total
6 compensation ..." and then it has the components, "may be
7 payable in the form of restricted stock units. Please
8 understand that the grant of restricted stock units is
9 subject to the standard terms and provisions of the
10 program."

11 So that couldn't be a clearer statement as of that
12 date to the person who received this letter that basically
13 your entire compensation package is in play at the firm's
14 option. So --

15 MS. SOLOMON: That's correct, Your Honor.

16 THE COURT: Right.

17 MS. SOLOMON: I mean I don't disagree with that.

18 THE COURT: Okay.

19 MS. SOLOMON: The point is that it might be --

20 THE COURT: Right.

21 MS. SOLOMON: -- and it might not be.

22 THE COURT: Right. And at that moment in time on
23 June 3rd, 1999 when this person got this letter they could
24 have said to themselves, I can't live with that uncertainty,
25 I've got -- you know, I've got to be able to plan, I have to

1 know with certainty that I have X thousand dollars coming in
2 every month, I'm going to go find another job, and they did
3 not do that.

4 And then if we're talking about -- I think by
5 definition we're talking about the five years proceeding the
6 filing, which you know, we're not going to debate the
7 circumstances leading up to it, it's kind of for the history
8 books now, but you're talking about people who started in
9 1994. Well those people -- we're really only talking about
10 the five-year period leading up to the filing. So those
11 folks, even if they began their employment in 1994, if they
12 were still working at Lehman in 2002, 2003 by that point in
13 time their -- at least there seemed to be examples of
14 documents that elaborated in some detail, you know, what
15 their compensation package looked like.

16 So I don't want to completely derail you, but what
17 I asked Mr. Miller this morning was, wait a minute, are you
18 telling me that without any notice whatsoever people who
19 were accustomed to bringing home, you know, \$15,000 a month
20 in cash all of a sudden found their paycheck reduced? And
21 he said, no, that's not the case. So --

22 MS. SOLOMON: Your Honor, I would disagree with
23 that. First of all to the extent that the program was
24 introduced in mid 1994, and --

25 THE COURT: Okay.

1 MS. SOLOMON: -- that's exactly my understanding
2 is what happened to employees during that time.

3 THE COURT: But -- right, but maybe this is my
4 lack of clarity. But if you were an employee in 1994 as of
5 the time of the bankruptcy in 2008 you're not holding an RSU
6 from 1994, it became stock.

7 MS. SOLOMON: That's correct.

8 THE COURT: Right.

9 MS. SOLOMON: And maybe you sold the stock after
10 you had the right to do so.

11 THE COURT: Okay. But you're not -- you're not
12 asserting a claim with respect to that are you?

13 MS. SOLOMON: No, but it's -- Your Honor, it's a
14 bit of a snowball effect, because 1994 comes and goes, and
15 unbeknownst to you, you know, you're rendering your services
16 and you're told mid-year that now you're going to get not
17 payment in cash, which was the cash, my understanding prior
18 to 1994 --

19 THE COURT: Okay.

20 MS. SOLOMON: -- that they got all payment in cash
21 regardless of whether --

22 THE COURT: Okay.

23 MS. SOLOMON: -- what was the specific, you know,
24 component --

25 THE COURT: Right.

1 MS. SOLOMON: -- bonus or not. Then 1994 rolls
2 around and now you're told mid-year or later in the year
3 that oh, well part of your compensation --

4 THE COURT: Okay.

5 MS. SOLOMON: -- is not going to be paid in cash.

6 THE COURT: Okay. So let's take that person then.
7 So in 1995 that person either stayed with Lehman or left.
8 So -- but in no event do I have a claimant here today who's
9 asserting a claim related to what occurred in 1994.

10 MS. SOLOMON: Well not specifically with regard to
11 that time period, but what happens is that -- and this is
12 really the purpose of the program -- you become handcuffed,
13 you become handcuffed to Lehman because now you're
14 compensation for 1994 you haven't received it all, it's been
15 withheld from you, and the only way --

16 THE COURT: It's been -- well another word for
17 withheld is deferred. It's a deferred compensation program.

18 So fast forward to 1999 and that stock that's been
19 you say withheld --

20 MS. SOLOMON: Correct.

21 THE COURT: -- I say -- or the other side says
22 deferred or issued pursuant to an RSU, in 1999 you then have
23 a share of common stock, right?

24 MS. SOLOMON: Right.

25 THE COURT: So the handcuff as it relates to what

1 you earned in 1994 is sprung open, right?

2 MS. SOLOMON: Right. But now you have '95, '96,
3 '97 --

4 THE COURT: Yes, you do.

5 MS. SOLOMON: -- and '98.

6 THE COURT: But -- so you're in 1998 and you've
7 now been doing this for four years and you are looking at
8 the value of Lehman common stock and you are saying to
9 yourself, I like that number on the piece of paper, look I
10 have my -- I see how many shares I have, it's a big number,
11 one more year and I get to cash out. But at any point you
12 could leave. You could go and go to another brokerage firm
13 and see what kind of a compensation arrangement they would
14 offer you.

15 The handcuff that you identify only describes the
16 RSU pre-issuance of common stock. That's the handcuff.

17 MS. SOLOMON: Correct.

18 THE COURT: Because of the conditions of the
19 program, which at least as of the date that these plan
20 documents are in effect, couldn't be clearer. That's the --
21 here are the bells and whistles, here are the belts -- the
22 conditions of your receiving this unit. You know that. So
23 you could say to yourself in 1999, I don't want to do this
24 anymore, I'm going to go to, you know, Banker's Trust or
25 Merrill Lynch or you know, unfortunately a lot of those

1 firms aren't still around anymore, but there were -- the
2 point is that there were a number of other options that were
3 available to you.

4 MS. SOLOMON: Well from the perspective of the
5 employee I don't know that they were because Lehman was
6 hardly unique in offering this kind of program.

7 THE COURT: But that --

8 MS. SOLOMON: So --

9 THE COURT: -- but that's exactly -- but that's --
10 I don't think that that's an argument that helps you. I
11 mean the -- well, I'm sorry, I'm going to let you keep
12 going.

13 MS. SOLOMON: No, Your Honor, believe me I welcome
14 your questions, I really do, because --

15 THE COURT: Okay. All --

16 MS. SOLOMON: -- we'd like to get to the heart --

17 THE COURT: Right.

18 MS. SOLOMON: -- the heart of what --

19 THE COURT: Right. All I was reacting to was your
20 one statement that they weren't told much about it, and the
21 only much that they weren't told was-- in my mind -- was the
22 at the firm's a portion of your total compensation could be
23 paid in the form of RSU.

24 And look, I'm with you, if I have a piece of paper
25 that says you get a minimum of 850, but by the way, most of

1 it could be issued in stock I think I have a real decision
2 to make as to whether I could live with that. I mean
3 \$200,000 in cash in 1999 is a lot more than bankruptcy
4 judges make in 2014, so it's not an insignificant number,
5 but that's -- that's beside the point. But why don't you
6 keep going.

7 MS. SOLOMON: Yes, Your Honor.

8 By way of an analogy if somebody wanted to
9 conclude a bargain to become an equity holder, if somebody
10 called up their broker and says, hey, Joe, I want to buy 200
11 shares of Microsoft or Google stock.

12 THE COURT: Right.

13 MS. SOLOMON: So can you please go and buy the
14 stock for me? Or by the way, just give me the money back.
15 Nobody does that. Because if somebody wants to invest and
16 become an equity holder they have a firm commitment, they
17 tell their broker to go and buy the stock, and that's not
18 what happened here.

19 It was a situation where there was no firm
20 commitment, and if the claimants truly wanted to become
21 equity holders then the choice would not have been left up
22 to Lehman.

23 THE COURT: Don't you have a -- don't you have
24 kind of an estoppel or waiver problem? I asked Mr. Miller a
25 lot of questions about are there claimants in the claimant

1 pool now who have common stock, albeit I understand which is
2 not worth anything under the Lehman plan, but who along a
3 continuum received these restricted stock units, some of
4 them hit the five years, they then have the stock. So now
5 those folks who have the stock also have RSUs, right?

6 MS. SOLOMON: Uh-huh.

7 THE COURT: And they're not saying that I don't
8 want to have this stock anymore, they're just saying that I
9 don't -- I want to get cash for the RSUs.

10 In other words, while things were going well
11 prefiling, right, when the stock was worth something before
12 the disastrous summer of -- spring and summer of 2008 --

13 MS. SOLOMON: Uh-huh.

14 THE COURT: -- they were happy to live with the
15 deal and the uncertainty, but then when the decline began to
16 occur and then the ultimate bankruptcy it was only at that
17 point that they, in your analogy, decided that, you know, it
18 wasn't a real ask to own the stock. I mean there's kind of
19 -- there seems like an inconsistency.

20 MS. SOLOMON: I don't know that I would say they
21 were happy to live with it. I would say that they did live
22 with it.

23 But I think the question is, what was the bargain
24 that was originally struck? And the bargain, from my
25 perspective, that was struck was an agreement for the

1 payment of compensation, and that compensation could either
2 be paid in cash or it could be paid in equity through the
3 device of the RSUs.

4 And the case law that we cite in our brief, one of
5 the first doctrines that we rely upon is the doctrine of
6 alternative performance, and there is very substantial
7 authority that says that when you have an alternative
8 performance obligation and it ultimately is rendered
9 impossible of performance, regardless of whose choice the
10 mode of performance was with, that the promisor needs to
11 perform its obligation. And the reasoning of those cases is
12 that what is the essence of the obligation that was
13 promised? And here it was compensation, payment of
14 compensation. And Lehman has not questioned here that there
15 was an alternative performance obligation, and that was
16 payment of cash or payment of equity through the device of
17 the RSUs and the CSAs.

18 And what happened when the bankruptcy hit? The
19 RSUs and CSAs had already been granted but not fully
20 performed on, and at that time performance on those
21 instruments became impossible of performance, Your Honor.
22 And why is that? Because the employees -- the employment
23 was terminated and ultimately the stock was canceled, and
24 Lehman was not in a position any longer to perform on its
25 promise. But the promise, that is the promise under the

1 RSUs, but the promise was payment of compensation, and the
2 cash alternative obligation existed as of the filing date,
3 it was contingent but it existed, and bankruptcy law
4 recognizes contingent claims, and that's what the employees
5 had. They had a contingent claim for Lehman's alternative
6 performance obligation.

7 Now what does Lehman say about this?

8 THE COURT: You know, if you just -- if you think
9 about the construct that you're outlining though and you
10 think in terms of perhaps a smaller business than Lehman or
11 maybe -- maybe not, but if you think about the concept from
12 an accounting standpoint that there could be a liability of
13 the company, a looming liability of the company, in other
14 words converting from equity to a creditor, I don't know how
15 you would account for that on a balance sheet. Because at a
16 certain point you would get to the point where a company is
17 says, you know, nearing the zone of insolvency, and it's got
18 to be running a set of numbers where it says, well, if we
19 file for bankruptcy we've got this huge springing obligation
20 that right now is equity, but it's going to convert into
21 debt, because that's what -- that's what you're saying. Is
22 that --

23 MS. SOLOMON: No, it's not.

24 THE COURT: Well, what you're saying is that these
25 -- I mean the bankruptcy absolute priority scheme divides

1 the world into claims and interests, right?

2 MS. SOLOMON: Correct.

3 THE COURT: There's claims, I'm calling them debt,
4 and there's equity, which are not debt, they're equity.

5 So what you're positing though is that you could
6 have this compensation system and this instrument that means
7 until there's a bankruptcy you get equity, the moment
8 there's a bankruptcy you get debt.

9 So when you're trying to figure out what you do is
10 you approach the zone of insolvency you would have this
11 looming springing balance sheet item that you'd have to take
12 into account. I just don't know -- I've never heard of such
13 a thing.

14 MS. SOLOMON: Isn't it just a contingent
15 liability, Your Honor? Contingent liabilities occur all the
16 time and the Bankruptcy Code expressly recognizes contingent
17 liability.

18 THE COURT: Right. That -- that's true, but the
19 bankruptcy -- but this is a -- this is something that morphs
20 from being equity that as you're approaching the zone of
21 insolvency, you know, the duties of the directors in fact
22 begin to shift.

23 MS. SOLOMON: Well, I would think we certainty
24 would acknowledge that it's equity. In fact the documents
25 that we went through this morning very clearly say that you

1 do not have the rights of a shareholder until the act of
2 conversion occurs after five years.

3 THE COURT: Right. But that --

4 MS. SOLOMON: So there's no equity here.

5 THE COURT: No, but you're taking that statement
6 out of context. That statement -- that statement in the
7 governing documents doesn't -- the negative implication is
8 not that you therefore have to rights of a general creditor.
9 That was to clarify that you didn't have -- you couldn't
10 bring a shareholder derivative suit, and the context there
11 is not what -- I don't believe what you folks make it out to
12 be in the papers. That is not -- the negative implication
13 of that is not that and therefore you have the rights of
14 creditors. It's that you have not even matured into having
15 all the rights of a shareholder. You are -- you have
16 contingent shareholder rights, so.

17 MS. SOLOMON: I agree with that, Your Honor.

18 THE COURT: Okay.

19 MS. SOLOMON: It is a contingent shareholder right
20 and something that had not matured as of the filing date.

21 THE COURT: Uh-huh.

22 MS. SOLOMON: The fact that the claimants did not
23 have the rights of shareholder doesn't necessarily lead me
24 to the conclusion that they have rights of a creditor just
25 by negative implication. What leads me to that conclusion

1 is the doctrine of alternative performance as well as other
2 documents that -- of Lehmans that I will get for in a little
3 while.

4 THE COURT: Okay.

5 MS. SOLOMON: And I want to emphasize, Your Honor,
6 that the contingent claim that they have under the doctrine
7 of alternative performance arose at the time that services
8 were rendered.

9 So in other words if you look at it as kind of
10 like a V, at the time the services were rendered there --
11 there was two ways in which Lehman could perform and
12 discharge its compensation obligation. One of them was
13 through a payment of cash and one of them was through the
14 issuance of equity through the device of the RSUs and the
15 CSAs. And Lehman started down the path of payment of
16 equity, but it didn't get as far as it would like because
17 the bankruptcy had stymied its efforts.

18 And so the cash alternative was always there, it
19 didn't just spring into existence at the time of the
20 bankruptcy, it was a contingent claim. And Lehman's
21 response to this is -- well they say it in a couple of
22 sentences.

23 "Putting aside the fact that at all times it was
24 within Lehman's sole discretion whether to pay part of
25 employees total compensation in either cash or equity-based

1 awards."

2 Well not true under the alternative performance
3 doctrine, Your Honor. But going on:

4 "Claimants continue to ignore that Lehman already
5 paid them the compensation they were due in the form of
6 RSUs. Once those RSUs were paid, as they were here,
7 claimants had no rights whatsoever to other modes of
8 performance in the form of cash or otherwise."

9 The legal defect, Your Honor, of that argument is
10 that the grant of an RSU somehow would be payment of
11 compensation, which it was not.

12 THE COURT: So that -- your position is that the
13 grant of an RSU is not the payment of compensation?

14 MS. SOLOMON: That's correct. The payment of
15 compensation is when the RSU is converted to stock, that was
16 the ultimate payment that the claimants were interested in,
17 not the grant of a piece of paper, that in your words, Your
18 Honor said, didn't give them the rights of a shareholders,
19 didn't give them the rights of anything. How could that be
20 a payment? It was a form of --

21 THE COURT: So a stock option is not a -- or a
22 warrant is not -- is not a form of compensation?

23 MS. SOLOMON: Well the question, Your Honor, is in
24 these circumstances where there was an alternative
25 performance obligation, so it was --

1 THE COURT: But where does it say that there's an
2 alternative performance obligation? None of these documents
3 say that and if it turns out the stock is not worth X we'll
4 give you cash, don't worry. Where does it say that?

5 MS. SOLOMON: That's the doctrine of alternative
6 performance, Your Honor.

7 When an obligation can be discharged through two
8 alternative means; cash, and another means, stock or
9 whatever it may be, that's what the courts construe it as.
10 And --

11 THE COURT: Can you -- just point to me exactly
12 where in your papers I should be looking or what cases I
13 should be looking at on that one?

14 (Pause)

15 MS. SOLOMON: If you look in our initial
16 memorandum, Your Honor --

17 THE COURT: Right, page 32?

18 MS. SOLOMON: It starts page 27 and goes on from
19 there. The section, the compensation claims are not for
20 damages under 510(b).

21 THE COURT: Uh-huh.

22 MS. SOLOMON: And we cite a number of cases, and
23 we state here the case law -- this is on page 29 --
24 uniformly recognizes that where a contract provides the one
25 of two alternative modes of performance and one mode becomes

1 impossible performance the promisor is not relieved from
2 performing the other. And we cite the Supreme Court's
3 decision in Yankton and Second Circuit case, the Glidden
4 case from 1960, and that case involved a charter agreement
5 that was rendered impossible performance because the
6 preferred method --

7 THE COURT: Well, let me ask -- let me ask you
8 this question. Suppose the -- you know, suppose this was
9 American Airlines, right? Well it turns out that the equity
10 holders of American Airlines actually got a return and are
11 making actually a large amount of money. So where -- where
12 would RSU holders in American be? They would be happy,
13 right?

14 I mean your argument turn is a result-oriented
15 argument. The claimants are unhappy because the RSUs and
16 the stock are not worth anything. But if the RSUs and the
17 stock were worth something they wouldn't be unhappy.

18 So you're trying to fit this into an alternative
19 performance situation. This is not that you can take
20 different routes to get through, you know, the Suez Canal or
21 not. I'm just --

22 MS. SOLOMON: What's the difference, Your Honor?
23 I mean one, there's an ultimate destination. In that case
24 it was the means of going through the Suez Canal or taking
25 another route.

1 THE COURT: Right.

2 MS. SOLOMON: But the point was that they -- that
3 the charter company was hired to deliver the cargo, and it
4 didn't matter how the cargo got here -- got there.

5 THE COURT: Right.

6 MS. SOLOMON: And in this case the employees were
7 hired by Lehman --

8 THE COURT: Right. But if you're -- to make the
9 analogy work then the undertaking of Lehman would have been
10 that at the end of each calendar year the employee would
11 have a cash or cash equivalent compensation of X amount, and
12 that's not what the deal was. The deal was --

13 MS. SOLOMON: Well why would that have to be, Your
14 Honor? I disagree with that. The point was the payment of
15 their compensation, and Lehman started down the process --
16 down the route of paying their compensation through the
17 vehicle of the RSUs.

18 THE COURT: Right.

19 MS. SOLOMON: But the ultimate was Lehman wanted
20 to give them equity. Well when do they get equity? They
21 only get equity when it converts.

22 THE COURT: Right.

23 MS. SOLOMON: And they got RSUs in lieu of the
24 equity for Lehman's purposes, not for the purposes of the
25 employees, because if they got equity immediately well then

1 Lehman wouldn't have any handcuffs on the employees.

2 So the only way this works from Lehman's
3 perspective is give the employees the RSUs, make them hang
4 around for another five years, and then when do they get
5 their payment? They don't get their payment when the RSUs
6 are granted to the employees, the payment they get is when
7 the stock converts to equity. That's the payment. And that
8 did not occur here --

9 THE COURT: Well there's a difference between --

10 MS. SOLOMON: -- and that's the impossibility of
11 performance.

12 THE COURT: There's a difference between, you
13 know, in the analogy is the tax laws, the -- this is
14 deferred compensation.

15 MS. SOLOMON: Correct.

16 THE COURT: This is deferred compensation. And
17 what you are positing is that when there's deferred
18 compensation that takes place in the form of stock you want
19 the upside but you don't want the downside. You will be
20 perfectly happy if at the end of the deferral period the
21 compensation turns out to be worth a lot, but if it turns
22 out to be worth a little then your idea is that you then
23 invoke alternative performance and you say give me the cash
24 instead. That's not what an equity component does. That's
25 not -- you know, so I think you're -- I think your toggling

1 in between this concept of alternative performance and
2 handcuffs. I mean it just sounds to me more like what
3 you're really stressing is the unfairness of --

4 MS. SOLOMON: No, not at all, Your Honor, I
5 disagree.

6 THE COURT: Well then what --

7 MS. SOLOMON: It's not a question -- this isn't a
8 question of were the employees happy or unhappy with it or
9 was it fair or was it unfair? That's not -- and I don't
10 need to be making that argument at all to Your Honor, it's a
11 question of what were the contract rights and what were
12 their rights under the common law? And the rights are set
13 forth in the doctrine of alternative performance.

14 And it is true that the RSUs were a form of
15 deferred compensation, but that deferred compensation had
16 not been paid to the employees. The payment only occurred
17 upon conversion of the stock. I mean the fact of the matter
18 is that the RSUs remained subject to forfeiture during the
19 entire term of the grants; isn't that correct?

20 THE COURT: Absolutely.

21 MS. SOLOMON: So how is it that --

22 THE COURT: Absolutely. And every single --

23 MS. SOLOMON: -- compensation --

24 THE COURT: -- and every single employee if they
25 read the plan documents knew that.

1 MS. SOLOMON: That's correct. So how is it that
2 compensation could have been paid but still the subject of
3 forfeiture? That doesn't make my sense.

4 THE COURT: Because you were --

5 MS. SOLOMON: You can't forfeit something that
6 you've already been paid.

7 THE COURT: You were absolutely told in your dear
8 colleague letter, here's what's going to happen. We're
9 going to give you a guaranteed minimum of 200,000, and at
10 our option we're going to pay you in RSUs, which may turn
11 out to be funny money or may turn out to be really valuable,
12 and at that moment and every year every employee -- and
13 we're not talking about unsophisticated folks here who are
14 making 850,000 a year in 1999 -- every year that individual
15 who got that letter had the ability to say I'm going stick
16 with it because there's a lot of money in it for me or I'm
17 going to leave. Every single employee who got that letter
18 had the ability do that.

19 We're not talking about, you know, -- you know
20 manicurists in Washington Heights who just brought a class
21 action because they're being paid \$5 a day, people who have
22 no meaningful other options and don't have the skill set or
23 the tool set or the wherewithal to break out of the
24 handcuffs.

25 I mean, you know, I'm trying to be patient, but

1 the notion that this was, you know, a handcuff that people
2 didn't realize that they were signing onto get something
3 that maybe wasn't going to be valuable and that one of the
4 reasons they couldn't leave was because most everybody else
5 in the business had the same compensation structure. The
6 reason they had that compensation structure is because
7 that's what the brokerage houses did. You got some cash and
8 you get this -- you get this -- there's a carrot, and the
9 carrot is stick with us, perform well, be an owner, and you
10 know, the rising tides will lift your boat too. And
11 unfortunately here, you know, the boat was the Titanic, but
12 that doesn't retroactively enable you to recharacterize and
13 change the nature of your deal going in.

14 So -- and that's what I'm reacting to is that
15 aspect of your argument.

16 MS. SOLOMON: And, Your Honor, I don't mean to
17 dwell too much on this point, but --

18 THE COURT: I'm making you dwell, so that's quite
19 all right.

20 MS. SOLOMON: Very good. But I just want to
21 emphasize that this isn't a question of recharacterization
22 or springing up, it's a question of what were the
23 preexisting rights --

24 THE COURT: Sure.

25 MS. SOLOMON: -- of the claimants as of the time

1 of the bankruptcy?

2 THE COURT: Absolutely.

3 MS. SOLOMON: And those rights were defined by
4 alternative performance rights that existed in this case and
5 that did not exist in the Enron case as well as their rights
6 under the wage laws which we'll get to in a little bit.

7 THE COURT: Okay.

8 MS. SOLOMON: And I also want to make the point
9 that as -- you know, the point I made earlier that they have
10 not received payment of compensation when they received the
11 grants of the RSUs. This is highlighted by one of Lehman's
12 own documents, and that's the 1997 trust under LBHI
13 incentive plans, and that's claimants' document number 62 in
14 the joint appendix.

15 (Pause)

16 THE COURT: The 1997 trust?

17 MS. SOLOMON: Correct, Your Honor.

18 THE COURT: Okay. Give me a minute. Okay.

19 MS. SOLOMON: And I'd just like to briefly go
20 through that document --

21 THE COURT: Sure.

22 MS. SOLOMON: -- for a couple of points. The
23 first is to highlight what I said a moment ago that payment
24 to the compensation claimants of their compensation did not
25 occur at the time of the grants of the RSUs but only upon

1 the conversion of the stock. And if that premise is correct
2 then their alternative performance rights continued up
3 through that date. And by virtue of the fact that the RSUs
4 never converted to stock they still had their alternative
5 performance rights and they had not ceased as of the time of
6 the bankruptcy.

7 And where does the trust support the premise that
8 payment of compensation has not occurred? Well if you look
9 at the third whereas clause on the first page it refers to
10 the trust holding certain assets, including shares, although
11 the trust also held cash as well, and it says there, "that
12 shall be held therein subject to the claims of the company's
13 general creditors." So that mean that is the compensation
14 claimants have no better rights to the shares than any other
15 creditors.

16 And it goes on, "In the event the company becomes
17 insolvent as hereinafter defined until paid to
18 participants."

19 So there they're referring to the shares being
20 paid to --

21 THE COURT: I'm sorry, the third whereas clause?

22 MS. SOLOMON: Yes, Your Honor, on the first page.

23 THE COURT: Yeah. "Whereas the company wishes to
24 establish a trust ..."

25 MS. SOLOMON: Correct.

1 THE COURT: And what are you saying that this
2 shows?

3 MS. SOLOMON: It shows that the payment of their
4 compensation did not occur upon the grants of the RSUs but
5 only upon the conversion to the stock.

6 THE COURT: I'm sorry, where -- where does it say
7 -- I just --

8 MS. SOLOMON: If you read -- if you read it, Your
9 Honor, it says --

10 THE COURT: Yeah.

11 MS. SOLOMON: -- "The company wishes to establish
12 a trust" --

13 THE COURT: A trust and to contribute --

14 MS. SOLOMON: -- "and to contribute or sell the
15 trust assets including shares" --

16 THE COURT: Right.

17 MS. SOLOMON: -- "that shall be held therein" --

18 THE COURT: Right.

19 MS. SOLOMON: -- "subject to the claims of the
20 company general creditors in the event the company becomes
21 insolvent" --

22 THE COURT: Okay.

23 MS. SOLOMON: -- "until paid to participants."

24 THE COURT: Right.

25 MS. SOLOMON: So the shares get paid to

1 participants, and that is the payment of their compensation,
2 it's not the grant of the RSUs themselves.

3 And the trust goes on further --

4 THE COURT: Okay. So you're -- I mean that's just
5 an enormous boot strap of an argument. You're saying that
6 in a whereas clause, which clearly is -- intends to
7 establish that and here you're saying that the word paid in
8 this context determines the question of whether or not upon
9 the issuance of the RSU that's a payment of compensation to
10 the shareholders.

11 This whereas clause is mere -- what it's saying is
12 that stuff is in the trust and it's in the trust subject to
13 the rights of the general creditors. In other words if
14 assets find their way into the trust and the general
15 creditors have a claim on it it's subject to that which is
16 the law any way, right?

17 MS. SOLOMON: Correct.

18 THE COURT: Until paid to the participants.
19 You're boot strapping that word which means giving out. It
20 -- the movement of the -- of the shares to the participants
21 at that point you're saying that that's the moment of
22 payment. It's just -- it's a boot strap argument.

23 MS. SOLOMON: I'm looking at the documents, and I
24 saw a statement, a presumption, a totally unsupported
25 statement by Lehman that payment of compensation occurred

1 upon the grant of RSUs.

2 What is the support for that? I -- and I went
3 back and I looked at the documents, and the documents say to
4 me, no, payment doesn't occur upon grant of the RSU, payment
5 occurs when the stock converts -- I'm sorry -- when the RSU
6 converts to stock, that's when the payment occurs. And if
7 you go through the trust there's various provisions that
8 highlight the fact that RSU holders are creditors of the
9 company.

10 THE COURT: Where -- where does it say that?

11 MS. SOLOMON: So if you turn to paragraph 1-E.

12 THE COURT: Same document?

13 MS. SOLOMON: Yes, Your Honor.

14 THE COURT: Establishment of trust?

15 MS. SOLOMON: Correct. And subparagraph E is at
16 the bottom of the page.

17 THE COURT: Okay.

18 MS. SOLOMON: And it says there:

19 "The principal of the trust and any earnings
20 thereon shall be held separate and apart from the funds of
21 the company and shall be used exclusively for the uses and
22 purposes of participants and general creditors as herein set
23 forth.

24 Participants shall have no preferred claim on or
25 any beneficial ownership interest in any assets of the

1 trust.

2 Any rights created under the plan and this
3 agreement shall be mere unsecured contractual rights of
4 participants against the company."

5 So here very clearly it's saying that they are
6 unsecured creditors of the company.

7 THE COURT: That's not -- I mean --

8 MS. SOLOMON: Fairly clearly. Can we settle on
9 that for the moment?

10 THE COURT: No, but you can keep going.

11 MS. SOLOMON: And if you turn a couple of pages
12 further, Your Honor, paragraph 3(b)(3), and it's Section 3,
13 it's trustee's responsibility regarding payments to trust --

14 THE COURT: I'm sorry, I missed the reference,
15 Ms. Solomon.

16 MS. SOLOMON: Sure, it's 3(b)(3).

17 THE COURT: 3(b)(3). Okay.

18 MS. SOLOMON: And that provides if at any time --
19 this particular paragraph deals with in the event of
20 insolvency, and it says:

21 "If at any time the trustee has determined the
22 company is insolvent the trustee shall discontinue payments
23 and shall hold the assets of the trust for the benefit of
24 the company's general creditors.

25 Nothing in the agreement shall in any way diminish

1 any rights of participants to pursue their rights as general
2 creditors of the company with respect to benefits due under
3 the plan or otherwise."

4 THE COURT: Okay.

5 MS. SOLOMON: And I would submit that that is
6 further acknowledgment that the RSU holders are viewed as
7 general creditors of the company.

8 THE COURT: Okay. Is that -- is this -- so this
9 is the trust, 1997 trust, do you track that provision
10 through all of the other organic documents?

11 In other words, there was -- there was in the
12 briefing and in the argument this morning it was pointed out
13 that the bankruptcy language in I think the 2003 and maybe
14 2004 plans disappeared in 2005. So this particular
15 language, can you track it through anywhere else but the
16 1997 trust?

17 MS. SOLOMON: Well the 1997 trust was an integral
18 document --

19 THE COURT: For --

20 MS. SOLOMON: -- to all of the program documents,
21 and it was in existence until the end.

22 THE COURT: Okay, but we -- I don't know what that
23 means. This agreement was dated as of September 4th, 1997.

24 MS. SOLOMON: Correct.

25 THE COURT: Is it the document that was the

1 operative document for the years -- the five years prior to
2 2008?

3 MS. SOLOMON: Yes.

4 THE COURT: We're only talking about claims for
5 the five years. So where is the -- where's the document
6 that's this document's equivalent for those years?

7 MS. SOLOMON: Your Honor, this is the document
8 that Lehman relies upon for voting rights. It's the sole
9 document.

10 THE COURT: Okay. I'm -- I'm absolutely confused.
11 Is the 1997 trust the document that was operative as of --
12 during the five years prior to the filing?

13 MS. SOLOMON: Yes, Your Honor.

14 THE COURT: Okay. Is that right, Mr. Miller? I
15 just -- I need to -- I apologize for cutting into your time,
16 but --

17 MS. SOLOMON: No, that's -- that's okay.

18 THE COURT: -- I just need to -- I just need to
19 understand what -- what we're talking ability here.

20 MR. MILLER: Ralph Miller for LBHI.

21 Your Honor, the 1997 trust was created in 1997 and
22 I believe this is the governing document which we do not
23 think was amended, it just created the trust. The trust
24 remained operational through the bankruptcy --

25 THE COURT: Okay.

1 MR. MILLER: -- date. But the trust -- I do -- if
2 I might just clarify --

3 THE COURT: Yeah.

4 MR. MILLER: -- one point here --

5 THE COURT: Yeah.

6 MR. MILLER: -- because there's been a little bit
7 of confusion with this alternative payment.

8 THE COURT: Well, I'm obviously -- I'm obviously
9 confused.

10 MR. MILLER: Not for the Court, Your Honor.

11 Alternative payment would become an issue if it
12 were the position of LBHI that we're not going to deliver
13 any stock at this point to these claimants because, for
14 example, they couldn't complete the five years because of
15 they were fired.

16 Well what this motion requests is that all of the
17 stock units --

18 THE COURT: Hold on, I'm going to shut him down in
19 a few minutes.

20 MR. MILLER: Okay.

21 THE COURT: Just hold on.

22 MR. MILLER: But this relates to the trust, Your
23 Honor.

24 THE COURT: Okay.

25 MR. MILLER: What this motion says is that all of

1 the trust -- all of the units of stock awards and stock
2 units are treated as becoming common stock under the plan.

3 THE COURT: Right. Okay. But --

4 MR. MILLER: So -- so that has happened --

5 THE COURT: -- hold on.

6 MR. MILLER: -- and that's full performance of
7 what would have happened under the trust.

8 THE COURT: Right. But I -- my question is not --
9 you know, at some later point you can react to the -- to the
10 alternative performance argument, I was just trying to
11 simply understand as a factual matter whether this trust
12 document is the operative document that is in effect during
13 the plan years that we're concerned with, and I think your
14 answer is yes, right?

15 MR. MILLER: Yes, Your Honor. I think my answer
16 also was that this document is we believe irrelevant to
17 anything that's happening now.

18 MS. SOLOMON: That wasn't the question.

19 MR. MILLER: But it is -- it was -- the document
20 itself was in effect.

21 THE COURT: Okay. All right. Well make a note
22 that at a certain point I'm going ask you to -- and I had --
23 I had made a note, but it's in light of the highly
24 structured nature of this hearing that I'm -- I'm doing this
25 in a way that I'm unaccustomed to, which is ordinarily I

1 would have more of a back and forth, but I'm trying to
2 respect the procedure that you folks negotiated, so
3 therefore it becomes more difficult to me when I get to a
4 point that I'd like to hear the other side to I don't want
5 to take away from your time.

6 So, Mr. Miller, if you're going to keep running
7 track of things that I'm going to want to hear about later
8 I'm going to want to hear about your reaction to the two
9 provisions that were pointed out by Ms. Solomon, and that as
10 I recall were also I think they were specifically pointed
11 out in the -- in the reply -- in the reply memorandum.

12 So -- so let's keep going.

13 MS. SOLOMON: Correct, Your Honor.

14 THE COURT: Okay?

15 MS. SOLOMON: Okay. Your Honor, that takes me to
16 the wage laws.

17 THE COURT: Okay.

18 MS. SOLOMON: And that is something also that
19 shareholders do not have the benefit of. They don't have
20 the benefit of alternative performance obligations and they
21 don't have the obligation of wage laws. And we've submitted
22 to Your Honor that the claimants here did have the benefit
23 of the wage laws.

24 Why is that? Because they had earned commissions
25 and so-called discretionary bonuses, and in some case

1 guaranteed bonuses also, which are fixed dollar claim
2 amounts. And at the end of the year with regard to for
3 instance the bonus claimants they were told, okay, this is,
4 you know, in their total compensation statements that they
5 received from the company --

6 THE COURT: Right.

7 MS. SOLOMON: -- this is the bonus amount that
8 you're receiving, a fixed dollar claim amount.

9 THE COURT: But look at the -- look at the
10 compensation statement, look all though tab 19 of the
11 binder.

12 MS. SOLOMON: Yes.

13 THE COURT: Do you have the binder that Mr. Miller
14 used?

15 MS. SOLOMON: Yes. Yes, I do, Your Honor.

16 THE COURT: Okay. So 2005 total compensation
17 statement, right?

18 MS. SOLOMON: Correct.

19 THE COURT: Couldn't be more clear, paid salary,
20 \$200,000. Bonus, \$900,000. Total compensation, a million
21 one, right? That's the compensation.

22 MS. SOLOMON: Right.

23 THE COURT: You say the 900,000 is not -- well,
24 that's not where it comes into play. But then it says,
25 "Equity summary in U.S. dollars."

1 MS. SOLOMON: Right.

2 THE COURT: Okay? And it's got the RSUs and the
3 equity component and it does the conversion and it's got the
4 employee discount and then it's got the number of shares,
5 right?

6 MS. SOLOMON: Correct, yes.

7 THE COURT: And then it's got the payment
8 schedule.

9 MS. SOLOMON: Uh-huh.

10 THE COURT: So payment, that was your word that
11 you pulled out of the 1997 trust, the whereas clause, right?
12 Payment. So you were paid -- here's the -- the bonus is
13 \$900,000, less the RSUs --

14 MS. SOLOMON: Uh-huh.

15 THE COURT: -- total cash payment, \$665,000,
16 right?

17 MS. SOLOMON: Right.

18 THE COURT: So this -- if I get this compensation
19 statement it could not be clearer to me that what I got for
20 2005 was \$665,000 in cash, that's the number I'm going to
21 report on my income tax --

22 MS. SOLOMON: Uh-huh.

23 THE COURT: -- and then I have this equity piece.
24 I have an RSU that if I am, as it says here, "All terms and
25 conditions of equity awards, including those related to

1 vesting and forfeiture, are subject to controlling plan
2 documents." And then it has the number -- it has the number
3 of shares.

4 So it doesn't say unless it turns out that these
5 aren't worth anything in which case you'll get the \$235,000
6 in cash.

7 MS. SOLOMON: No.

8 THE COURT: At that -- at this moment in time the
9 person who gets this, this you know, as senior vice
10 president --

11 MS. SOLOMON: Right.

12 THE COURT: -- knows that that's what they have.

13 MS. SOLOMON: Your Honor, I want to be clear on
14 this point. That we're not making the claim that the RSUs
15 themselves are wages, we're making the argument that there
16 was a bonus award made to the claimants not all of which was
17 going to be paid in RSUs, some of it was going to be paid in
18 cash --

19 THE COURT: Right.

20 MS. SOLOMON: -- in a month or two after the year
21 end.

22 THE COURT: Okay.

23 MS. SOLOMON: And that when you look at these
24 claimants they were clearly the holders of wages, the
25 individuals themselves.

1 THE COURT: Okay. So now I'm confused.

2 If this -- this compensation statement that we're
3 looking at, and I asked Mr. Miller this morning, if somebody
4 was told your total cash payment is going to be 665- and --
5 I mean the timing is off -- but --

6 MS. SOLOMON: Uh-huh.

7 THE COURT: -- if someone had cash coming to them
8 then they in fact have a wage claim and Lehman -- so they're
9 -- they have a wage claim.

10 MS. SOLOMON: Right. So --

11 THE COURT: They're an unsecured creditor entitled
12 to the priority under the Code. That's not --

13 MS. SOLOMON: Well part of it -- part of it was
14 cash. So part of it was an RSU and part of it was cash.

15 If you look at -- there was one individual --
16 there was one individual holding both components of its
17 claim.

18 THE COURT: I really am -- so I'm now thoroughly
19 confused.

20 I believed that all of the claimants that we're
21 talking about in this proceeding are asking for their RSU-
22 related compensation to be turned into a general unsecured
23 claim. I did not think that we were talking about any
24 claimants' claim that Lehman was seeking to subordinate any
25 claimants' claim for unpaid cash wages.

1 MS. SOLOMON: No, the cash wages, Your Honor --
2 the cash wages were paid.

3 THE COURT: Right.

4 MS. SOLOMON: But the question is the individual
5 who was the holder of the claim at any point in time. I
6 mean the wage laws of the State of New York and the various
7 other states make very clear that you need to have full
8 disclosure made to wage holders.

9 THE COURT: Okay.

10 MS. SOLOMON: Were these -- even though their cash
11 was paid earlier on, were they a holder of a wage claim at
12 some point in time? Yes, they clearly were, because --

13 THE COURT: I don't -- I -- I'm sorry, I just -- I
14 literally do not understand your argument. I don't
15 understand.

16 People go to work and they're told we're going to
17 pay you this amount of money, at our discretion we're going
18 to pay you part of it in cash and part of it in a restricted
19 stock unit, and then that's exactly what happens. They
20 don't get told that we're going to pay you instead of an RSU
21 we're going to pay you in Monopoly money, they get what they
22 were told they were going to get. They get cash or
23 restricted stock units.

24 So what's the wage claim? They got what they were
25 told they were going to get. They now are complaining

1 because part of it's not worth anything.

2 I just don't -- I don't understand what is the
3 wage claim?

4 MS. SOLOMON: That they are -- let's say this
5 occurs in December, okay? December they meet with their
6 superiors and this particular claimant is told they have a
7 \$900,000 bonus.

8 THE COURT: Right.

9 MS. SOLOMON: Well 235,000 of that is going to get
10 paid in RSUs, right?

11 THE COURT: Right.

12 MS. SOLOMON: But --

13 THE COURT: And --

14 MS. SOLOMON: -- much of it is --

15 THE COURT: -- they actually -- and they get the
16 RSUs, they get them.

17 MS. SOLOMON: Yeah, but before they get it, let's
18 say, you know, right after their meeting, okay, before they
19 get their RSUs or before they get their cash bonus are they
20 a holder of the wage claim? Yes, I think that they are.
21 Because they've been advised --

22 THE COURT: But that's -- but they got what they
23 -- they got what Lehman told them they were going to get.
24 They got cash and they got RSUs. This is -- so they --

25 MS. SOLOMON: But that's not the issue, the issue

1 is one of disclosure. So they might have gotten what Lehman
2 told them they were going to get, except that Lehman never
3 gave them the proper disclosure that was incident to
4 participation in their plan --

5 THE COURT: Well --

6 MS. SOLOMON: -- in Lehman's plan in the first
7 place.

8 THE COURT: -- what would the -- what should the
9 disclosure have been?

10 MS. SOLOMON: By the way guy, it's Lehman's view
11 that if you enlist in this plan your participation and
12 nothing else is going to make your wages that you would
13 otherwise be entitled to under state law, subject to
14 subordination under the Bankruptcy Code, in the event Lehman
15 files bankruptcy.

16 Lehman didn't say that to anybody, even though it
17 concerned the claimants' wages, and they were entitled to
18 that kind of disclosure from Lehman.

19 THE COURT: So what if they got -- what if they
20 got instead of it being a restricted stock unit they got
21 just stock unrestricted, would Lehman had had to say, oh, by
22 the way, in the event we file for bankruptcy and there
23 aren't sufficient assets to cover the claims of all
24 creditors your stock will be worthless?

25 I mean again, I'm going to use the analogy, you

1 know, in that formulation the volume of disclosures would be
2 -- would be boundless.

3 Just you're asking me to conclude that when this
4 person who got the compensation statement on, you know, for
5 2005, had no idea that something called equity --

6 MS. SOLOMON: Uh-huh.

7 THE COURT: -- shares -- shares listed under
8 equity summary that are called equity component that
9 specifically says that all terms and conditions of equity
10 awards, including those related to vestiture and forfeiture
11 are subject to controlling plan documents, which themselves
12 are subject to applicable law, that this person who in 2005
13 earned 1.1 million did not understand that equity might be
14 the value of the equity component might be at risk?

15 MS. SOLOMON: But that's not the issue. The issue
16 is because they are entering into this kind of arrangement
17 that their claim would be subject to 510(b) of the
18 Bankruptcy Code, and they would not have had that kind of
19 risk of forfeiture with regard to their wages if they were
20 just getting paid straight in cash compensation. And the
21 wage laws --

22 THE COURT: But they weren't getting -- they
23 weren't getting paid in straight cash compensation.

24 MS. SOLOMON: Right, but that's the point, the
25 wage laws --

1 THE COURT: They were being told it's equity.

2 So when -- so your rule is that -- your rule is
3 that when people go to work at a company anywhere they have
4 to basically take a mandatory course in Chapter 11 so that
5 they understand that if the company goes bankrupt here's
6 what their wages are subject to, here's how the absolute
7 priority works -- rule works, here's -- I'm sorry, it --

8 MS. SOLOMON: It's not my rule, Your Honor, it's
9 the Court of Appeals rule that says --

10 THE COURT: What Court of Appeals rule is that?

11 MS. SOLOMON: March versus Prudential.

12 THE COURT: What does that say?

13 MS. SOLOMON: Which is cited in our brief and
14 various other case law which establishes that with regard to
15 wage laws and wages of employees full disclosure has to be
16 made to the employees of all the risks attendant to
17 participation in this kind of employee benefit plan.

18 THE COURT: So your argument here at this point is
19 boiling down to the fact that because none of the plan
20 documents specifically say that your -- this might be
21 subject to equitable subordination or treated as an equity
22 for the purposes of Chapter 11 that therefore these folks
23 are entitled to have a claim as a general unsecured
24 creditor.

25 MS. SOLOMON: My position is there wasn't adequate

1 disclosure made.

2 THE COURT: Okay. And the adequate -- the failure
3 to make adequate disclosure then doesn't fall within the
4 claim in connection with the purchase or sale of the
5 security. So --

6 MS. SOLOMON: It falls under the wage law, Your
7 Honor. It gives them a fixed wage law claim, a fixed debt
8 claim, and the case law recognizes that a fixed debt claim
9 is not subject to subordination under 510(b) of the
10 Bankruptcy Code.

11 THE COURT: Okay.

12 (Pause)

13 MS. SOLOMON: Your Honor, we've made various other
14 arguments in our brief addressing the absence of a security
15 --

16 THE COURT: Okay.

17 MS. SOLOMON: -- and a purchase and a sale, and I
18 think that we mostly addressed those issues.

19 I did want to address a couple of points which
20 Lehman makes in its brief.

21 THE COURT: Okay.

22 MS. SOLOMON: We submitted to the Court that the
23 analysis of whether security exists or not should start and
24 end with whether or not there's an investment contract here,
25 and which we believe is consistent with the Supreme Court's

1 decision in the Daniel case, and we think that the -- that
2 the reasoning that the Court employed there is fully
3 applicable here.

4 THE COURT: So can I just -- I just want to -- I
5 just want to go back to this -- to the wage law claim.

6 MS. SOLOMON: Sure.

7 THE COURT: So in your papers at page 37 you say,
8 "Deductions or withholding from wages are unlawful unless
9 they are expressly authorized in writing by the employee."

10 So you're alleging a violation of that New York
11 labor law section.

12 MS. SOLOMON: We are, Your Honor.

13 THE COURT: An employee may not be forced to waive
14 labor law protections.

15 MS. SOLOMON: That's correct, Your Honor.

16 THE COURT: That's what you're alleging.

17 MS. SOLOMON: In those cases --

18 THE COURT: And that the compensation -- you then
19 go on to say "that the compensation claims are
20 distinguishable because they were given no choice but to
21 participate in the RSU CSA plan if they wanted to obtain or
22 keep their job." So --

23 MS. SOLOMON: I think that's really -- that's just
24 a very small part of that, but that is part of the argument
25 and as well as Your Honor noted that there were no signed

1 written authorizations in many, many cases.

2 THE COURT: So many employees did not sign written
3 authorizations for deductions from their wages.

4 So what you characterize as a deduction is the
5 implementation of the dear colleague letter that says you're
6 going to get total compensation of this and at our option
7 we're going to give it to you part in stock and part in
8 cash, and in essence you're saying the employees were
9 defrauded because they didn't realize that the stock part
10 might be subject to subordination under the Bankruptcy Code.

11 MS. SOLOMON: Not that they were defrauded, Your
12 Honor, but that they didn't receive adequate disclosure
13 under the wage laws.

14 THE COURT: "And that acceptance and continuation
15 of employment with Lehman, subject to the terms of the RSU
16 CSA plan, was not done with knowledge of the risks and
17 rewards specifically with respect to possible
18 subordination."

19 So are you going to -- is there going to be
20 testimony on that?

21 MS. SOLOMON: No, I think that the documents speak
22 for themselves, Your Honor.

23 THE COURT: So I'm not entitled to -- I'm not
24 entitled -- or you're not intending to proffer somebody who
25 got one of those wage statements and me to find out at any

1 level what their level of sophistication was, what their
2 knowledge was, you just want me to find that nobody knew
3 that they had -- nobody knew the bankruptcy implication of
4 having an equity component of their compensation.

5 MS. SOLOMON: I'm not sure which -- when you say
6 the wage statements are you referring to the total
7 compensation statements?

8 THE COURT: Yeah. Yeah.

9 MS. SOLOMON: Well, I think that the -- as I said
10 the documents speak for themselves that -- and Lehman has
11 never alleged, and I think they concede the point that --
12 that there was no -- the only disclosure as to 510(b) that
13 was ever made to any of the claimants were those -- the
14 510(b) subordination clause that we were going over earlier
15 this morning, otherwise the word 510(b) does not appear in a
16 single document that was submitted to any claimants in all
17 of the thousands of pages of disclosure of various
18 conditions under which they could forfeit their wages.
19 There's no mention of 510(b), Your Honor.

20 THE COURT: Okay.

21 MS. SOLOMON: Going to the issue of whether or not
22 there's a security here.

23 Lehman makes the point and cites to the Enron
24 case, and they make the point relying on Enron that it's not
25 necessary to harmonize 510(b) with federal security

1 statutes, but I think it's important to carefully note
2 exactly what Judge Gonzalez in Enron did and did not say.

3 And in specific he said -- and the discussion was
4 in the context of fraudulent inducement and specifically
5 actually fraudulent retention claims that he was considering
6 in that case -- and he said:

7 "Whether or not comparative statutory malices are
8 valuable in full context, comparative analysis of Rule 10
9 (b)(5) in the Securities Act does not appear fruitful here."

10 THE COURT: Okay.

11 MS. SOLOMON: And then he goes on further to say:

12 "That is not the say there could be no reason to
13 harmonize these two statutes, only that there's no evidence
14 that such harmony was intended or required here."

15 And so, you know, we believe that what Judge
16 Gonzalez had to say about fraudulent retention claims and
17 relying upon federal securities law with regard to those
18 claims is not relevant to the issue here of whether the
19 Court's analysis in Daniel should be considered with respect
20 to whether or not there's a security. And in Daniel the
21 Supreme Court found that there was no security with regard
22 to a pension plan because there the pension plan had been
23 mandatorily imposed upon an employee, and the Court found
24 that there was not an investment decision and that the Court
25 was not willing to consider the claimant and employee there

1 as an investor, but rather the Court in looking at the
2 economic realities of the situation found that he was only
3 looking for obtain a livelihood.

4 And we think that that reasoning is quite relevant
5 here with regard to the Lehman employees and that they were
6 only looking to make a livelihood and that they weren't --
7 and they did not come to Lehman to profit on Lehman's stock,
8 it was only a career decision to join Lehman and go along
9 with the compensation plan that Lehman had -- was ordaining
10 for its employees (indiscernible - 01:10:37).

11 THE COURT: But to go back to the employees who at
12 the moment of the filing, say a ten-year employee who had
13 been working pursuant to the plan for -- from 1998 to 2008,
14 right? So they've got grounding five years under their belt
15 of RSUs that converted, quote/unquote, into common stock,
16 right?

17 MS. SOLOMON: That already converted?

18 THE COURT: That already converted, right?

19 MS. SOLOMON: Yes.

20 THE COURT: And then they've got five years that
21 had not yet converted, so they presumably could be a
22 claimant here, right?

23 MS. SOLOMON: Correct.

24 THE COURT: So that person is not saying now --
25 because the common stock, if they were still holding it, is

1 now worthless, right?

2 MS. SOLOMON: Correct. My particular clients,
3 every single last one of them already sold their common
4 stock as soon as it converted, but so --

5 THE COURT: Okay. Well --

6 MS. SOLOMON: -- it would -- it's not relevant for
7 them.

8 THE COURT: Right. Okay. But I'm going to --
9 well then maybe you're not the right person to ask the
10 question, but to me you -- you know, you can't have your
11 cake and eat it too.

12 So if you're a claimant who was there for ten
13 years and, you know, you rode the stock up, you know, didn't
14 sell it the moment that you converted, then if you follow
15 your argument through to its logical conclusion, then that
16 claimant who has five-years worth of stock issued, you know,
17 nominal amount, I don't know, you know maybe 10,000 shares
18 if you -- you know, if you take that one -- I'm making it
19 up, I don't know what the number is -- but say they have
20 10,000 shares that are worth nothing and then they have RSUs
21 that entitle them to another 10,000 shares that are now
22 unfortunately worth nothing, then why isn't that claimant
23 saying the whole thing was no good. I didn't have
24 disclosure about any of it. I didn't know that equity falls
25 to the bottom of the bankruptcy. I want a wage claim for

1 the whole ten years.

2 I don't understand the distinction between when
3 you have that person standing there, a ten-year employee
4 with five years worth of stock --

5 MS. SOLOMON: Uh-huh.

6 THE COURT: -- now worth nothing, five years worth
7 of RSUs now worth nothing.

8 MS. SOLOMON: You mean what's the distinction
9 between the stock and the RSUs?

10 THE COURT: Yeah. I mean the whole thing
11 unfortunately has left them with a bucket of compensation
12 that isn't worth anything. In retrospect they would rather
13 have been paid in cash. They weren't given that option.

14 At any point in 1999, 2000, 2001, you know, and we
15 could go back and look at, you know, what the stock market
16 was doing then, but they stayed in. They stayed with it.

17 MS. SOLOMON: Well, they stayed -- you mean they
18 stayed in because they stayed with Lehman? Because they
19 didn't stay in in the sense that they had any decision to
20 make with regard to the sale of their RSUs. They couldn't
21 do that. They were locked in for five years. And that's
22 very different from the situation --

23 THE COURT: And at any point --

24 MS. SOLOMON: -- in Enron.

25 THE COURT: That's right. At any point -- at any

1 point they could have said I'm going to go work somewhere
2 else. I'm going to -- I don't like this, I want all cash, I
3 don't want an equity component, this is not working for me,
4 I can go somewhere else. And I'm having, I think as you can
5 tell, I'm having a really hard time with that argument.

6 MS. SOLOMON: But doesn't -- Your Honor, doesn't
7 Daniel respond to that issue? Because the Court says I'm
8 not going to view the act of accepting employment or
9 remaining in employment as a -- as a decision to invest in
10 the company in that case, the Court was not -- that's what
11 the Court of Appeals below had found, but the Court said,
12 no, that's not -- it's not an investment decision, this
13 employee was making a decision to obtain a livelihood, and I
14 think that's the response, and I think that's the proper
15 response.

16 THE COURT: Well, I'll go back and read it again,
17 I'm not -- I'm not seeing it that way at the moment, but I
18 hear the point that you're making.

19 And I'm being told that actually your notebook is
20 now on top of the microphone.

21 MS. SOLOMON: Yes.

22 THE COURT: On the podium.

23 MS. SOLOMON: Oh.

24 THE COURT: So that --

25 MS. SOLOMON: I apologize, Your Honor.

1 THE COURT: -- folks can't hear you and the
2 assistant can't hear you.

3 MS. SOLOMON: Okay.

4 THE COURT: Okay.

5 MS. SOLOMON: We have corrected that problem.

6 THE COURT: So is -- am I going to hear from other
7 counsel?

8 MS. SOLOMON: You are, Your Honor.

9 THE COURT: Okay.

10 MS. SOLOMON: And I just wanted to address one
11 other point.

12 THE COURT: Sure.

13 MS. SOLOMON: And that has to do with the removal
14 of the subordination clause --

15 THE COURT: Sure.

16 MS. SOLOMON: -- in later years.

17 I don't think that the issue here and I don't
18 think we need to speculate what was the reason that Lehman
19 removed the subordination clause. Again, I think that
20 Lehman controlled all the documents and it was very easy for
21 it to say in any of the documents that it was distributing
22 to employees, give an explanation as to the -- the inclusion
23 of the subordination clause in the first place and as well
24 as the removal of the subordination clause.

25 And I think the best case where we -- you know, we

1 have submitted that it was the intention of Lehman or
2 expressed intention in purposefully removing the clause from
3 all the documents for forever more that it expressed its
4 intention that these claims should not be subordinated, and
5 if it were its intention --

6 THE COURT: You know, but it actually --

7 MS. SOLOMON: -- or otherwise --

8 THE COURT: -- doesn't matter what their intention
9 is because the law is what is law is. I mean that's the
10 thing about all the time people put into orders that they
11 submit to this Court to the fullest extent of applicable
12 law, and I routinely strike it out because everything is
13 only --

14 MS. SOLOMON: That's correct, Your Honor.

15 THE COURT: -- to the fullest extent of applicable
16 law.

17 So here what you're suggesting is that it's even
18 worse. I think what you're saying is that Lehman saw that
19 and they said to themselves, uh oh, we leave that in people
20 might really know their rights and may not want to work for
21 us, so let's take it out so we can trick them into working
22 for us and accepting this subordination risk. And if that
23 is in fact what happened then that conduct and the claim
24 arising from that conduct gets subordinated under 510(b).

25 MS. SOLOMON: Right, but we're not going to --

1 we're not going presume that was the case, because that
2 would have been bad faith.

3 THE COURT: But that's --

4 MS. SOLOMON: That would have been bad faith as
5 Your Honor just suggested.

6 THE COURT: I understand, but --

7 MS. SOLOMON: We're not suggesting it. And so the
8 only other logical conclusion is that Lehman was not acting
9 in bad faith --

10 THE COURT: Right.

11 MS. SOLOMON: -- and that it's removal in fact
12 points to the conclusion that subordination should not
13 apply.

14 THE COURT: Okay, I hear you.

15 MS. SOLOMON: Thank you, Your Honor.

16 THE COURT: Okay.

17 (Pause)

18 THE COURT: Ms. Solomon, I don't recall that
19 you've appeared before, but this is in the nature of
20 spirited debate, it's not --

21 MS. SOLOMON: I love it, Your Honor.

22 THE COURT: I'm glad.

23 (Laughter)

24 MR. BOYAJIAN: May it please the Court, good
25 afternoon, Your Honor, Jim Boyajian who's in from Los

1 Angeles on behalf of seven claimants all the way from
2 California to Colorado --

3 THE COURT: Okay.

4 MR. BOYAJIAN: -- New Jersey, New York, UK.

5 THE COURT: Okay, I assume you're admitted pro hac
6 to this court?

7 MR. BOYAJIAN: Yes, I am, Your Honor.

8 THE COURT: Okay. Very good.

9 MR. BOYAJIAN: And I'm going try to limit my
10 comments to about 15 minutes as I understand we have -- may
11 have some witnesses going up today.

12 THE COURT: Okay.

13 MR. BOYAJIAN: So I want to start off with a
14 couple points addressing some of what was --

15 THE COURT: Could you tell me who your group is,
16 who do you represent?

17 MR. BOYAJIAN: Okay. So I represent commission
18 salespeople --

19 THE COURT: Okay.

20 MR. BOYAJIAN: -- in California and Colorado,
21 bonus people in east coast, New Jersey and New York.

22 THE COURT: Okay.

23 MR. BOYAJIAN: As well as one gentleman in London,
24 and they're claims range from a tiny claim of \$6,000 for an
25 IT employee --

1 THE COURT: Uh-huh.

2 MR. BOYAJIAN: -- in New Jersey --

3 THE COURT: Okay.

4 MR. BOYAJIAN: -- to a \$3 million claimant in
5 London.

6 THE COURT: Okay.

7 MR. BOYAJIAN: So I've had the opportunity to look
8 at this issue from many different angles. I'd like to start
9 off with some big picture points. First of all in response
10 to some of the ambiguities that were raised this morning on
11 the documents presented by counsel.

12 Generally ambiguity is construed against the
13 drafter of the document, especially when there is a
14 disparity between the party and power as was the case here.

15 Lehman drafted those documents and forced it on
16 its employees, so we ask the Court to construe any ambiguity
17 against the drafter.

18 Now this case involves novel instruments and
19 questions of first impression. Debtor's counsel asked the
20 Court to take a very narrow view, almost tunnel vision view
21 of this case in the context and aftermath of the Enron case,
22 but that case is restricted strictly to stock options per
23 Judge Gonzalez' own footnote 3 from that case.

24 Moreover, the issues raised here were not raised
25 by the claimants in Enron, and Judge Gonzalez was not asked

1 to consider things like the wage law arguments, the
2 impossibility of performance of actually getting a chance to
3 deliver the stock, the alternative performance arguments
4 raised by Ms. Solomon under state contract law, as well as
5 interpreting the definition of a security in the broader
6 context of the securities laws.

7 Of course I don't have to explain to Your Honor
8 that the Bankruptcy Code's definition is almost identical --
9 virtually identical to the 33 definitions of security, which
10 is why we're asking this Court to take the big picture view
11 and analyze whether or not there was a security here, which
12 is one of the 510(b) elements in the broader context of
13 securities law analysis, which of course is based on the
14 baseline test of the Howie case and its progeny, including
15 the cases that we cited, Landrith (ph) and Foreman, which
16 I'll -- if I have time I'll --

17 THE COURT: Okay.

18 MR. BOYAJIAN: -- be happy to address those.

19 I'd like to address 510(b) just briefly and make a
20 few points.

21 THE COURT: When you talk about the picking up on
22 what Ms. Solomon said, the impossibility --

23 MR. BOYAJIAN: Yes.

24 THE COURT: -- issue. What's the impossibility
25 that occurred here?

1 MR. BOYAJIAN: The impossibility to deliver actual
2 stock as was promised as one of the alternatives --
3 obligations that Lehman took upon itself.

4 Lehman left itself many outs in these documents
5 and said, well, it's really up to our discretion whether --
6 whether or not we deliver RSUs, it's really up to our
7 discretion whether or not we deliver stock, and you have no
8 choice in the matter, and so you know, if under certain
9 circumstances if we decide to give you cash then so be it,
10 you know, that's really none of your investment decision.

11 THE COURT: It's your decision whether or not to
12 accept the conditions of these as the conditions of your at
13 will employment, which is this here's how I'm going to pay
14 you. I'm going give you some cash and I'm going to give you
15 some restricted stock units, some pieces of paper that
16 entitle you to receive stock at a certain point, and every
17 year I'm going to say the same thing to you, and every year
18 you can decide anew whether or not you come to work at
19 Lehman or whether you go to work somewhere else.

20 So when you started out by telling me that it was
21 forced upon them that's just not an accurate statement.

22 MR. BOYAJIAN: I'd like to raise a consideration
23 for the Court.

24 THE COURT: Sure.

25 MR. BOYAJIAN: In 2006 Lehman exercised its

1 unilateral right to amend the documents.

2 THE COURT: Okay.

3 MR. BOYAJIAN: And in 2006 they made a material
4 change which was to take out the competitive activity
5 provisions of a voluntary termination.

6 So what does that mean? It means you've been
7 working at Lehman since 1998, you've collected, you know, a
8 whole array of RSUs, and 2006 rolls around, halfway through
9 the year you get an email saying, well guess what, if you go
10 work for the Red Cross or if you go travel the world, if you
11 simply leave for any reason not necessarily to go work for
12 your --

13 THE COURT: Right.

14 MR. BOYAJIAN: -- one of our competitors, you're
15 going to lose all your RSUs.

16 So I mean do you really have a choice to vote with
17 your feet, Your Honor?

18 THE COURT: Sure you do. You absolutely do. You
19 are -- when you go into a situation and you understand or
20 are -- the operative documents surrounding your employment
21 make it I think pretty clear that the conditions of it can
22 be changed at the option of the employer, then other than
23 treating you in a way that violates, for example, your
24 civil rights, then you are engaging in that employment
25 situation --

1 MR. BOYAJIAN: What happens if every bank and
2 every employer then across the country decides to use this
3 type of program? Then you know what rights will employees
4 really have? What bargaining power would they have to --

5 THE COURT: Well, you know, I mean -- like -- you
6 know, I mean I think that I'm not here to solve the world's
7 problems, but --

8 MR. BOYAJIAN: Well but this case is going to set
9 precedent of course.

10 THE COURT: I repeat, I'm not here to solve the
11 world's problems, I'm here to decide this case, you know,
12 under the facts and the law, and so far the essence of the
13 argument that I've gotten and I was told at the pretrial
14 it's not about asking for sympathy it's about applying the
15 law.

16 The essence of the argument so far is that this
17 was outrageous, people were forced to do this, and that this
18 is outrageous, that people didn't understand that equity
19 meant equity, that it meant up and that it also meant down
20 or in this case down and out. And I'm struggling, I'm
21 struggling with that. I mean I'm not going to try to hide
22 it. I am struggling with that argument.

23 So why don't I let you keep going a little.

24 MR. BOYAJIAN: All right. Well, I'd like to
25 actually address your questions about whether these RSU

1 units were really equity, because it was our position that
2 they were not actually equity stakes in the company. They
3 cannot be treated the same as shareholders. In fact
4 Lehman's documents themselves stated that you do not have
5 the rights of a shareholder until the shares are actually
6 granted. These RSUs are a facade. There is no actual stock
7 underlying the RSUs with the employee's name on it like the
8 restricted -- like with restricted stock as opposed to RSUs.
9 Until the --

10 THE COURT: So --

11 MR. BOYAJIAN: -- until the RSUs vest three years
12 later. So I mean let's go through a number of factors, Your
13 Honor. So until the vesting date three years later what do
14 you really have? You just have a credit saying that oh,
15 Lehman --

16 THE COURT: Right.

17 MR. BOYAJIAN: -- has an IOU --

18 THE COURT: That's right, that's exactly right.
19 That's what you have, you have a piece of paper that says
20 that if you fulfill all of the conditions, all terms and
21 conditions, including those related to vesting and
22 forfeiture under the controlling plan documents, if you jump
23 through all those hoops then at the end of that period of
24 time you get Lehman stock. That's exactly what you're told
25 that you have and that's exactly what you have.

1 But in your scenario, which I'm -- which somewhat
2 contradicts what Mr. Miller said, Mr. Miller said that the
3 actual shares to be issued by the -- pursuant to the RSUs
4 were actually issued maybe not in a one to one but in some
5 manner and they were put into a trust and there was a
6 trustee and that trustee voted on behalf of the RSU holders.
7 So you just said something that is contrary to what
8 Mr. Miller said, so we should get to the bottom of that.

9 But suppose this were a Ponzi scheme. Suppose
10 this were Madoff. Suppose Lehman never issued any shares
11 whatsoever, they didn't exist. It's still a claim under
12 510(b). It's a fraud then that worse -- even worse it's a
13 fraud that was perpetrated upon you. You were told that you
14 were going to be paid this amount, you weren't paid this
15 amount, you weren't -- you were told you were going to be
16 paid in this form of currency, in fact we never -- we never
17 minted that currency, it's a fraud.

18 MR. BOYAJIAN: A different scenario, Your Honor.
19 There's no intention to defraud here, we've never made a
20 fraud claim.

21 THE COURT: But that's even worse. But I'm saying
22 that the reason you that haven't is because I think that you
23 can't show that.

24 But what I'm saying is that it's a fortiori. If a
25 fraud claim -- if Lehman had intentionally defrauded your

1 clients then that claim would be subordinated.

2 You are not claiming an intentional claim, you're
3 claiming a failure to disclose, you're claiming, you know,
4 all sorts of things, right?

5 MR. BOYAJIAN: Right.

6 THE COURT: So --

7 MR. BOYAJIAN: The statutory right to payment
8 under the wage laws --

9 THE COURT: Okay.

10 MR. BOYAJIAN: -- from the various jurisdictions
11 where many employees worked across the states around the
12 world as well as contractual rights, the payment upon
13 impossibility of delivery of what was promised. That's
14 really what we're arguing.

15 We're not arguing fraud, we're not arguing breach
16 of contract. There was no breach of contract. This is
17 simply an impossibility, and there is a wholly stand-alone
18 area of law called impossibility within the context of the
19 contract law, and that's what we're basing our claims on.

20 Again, these RSUs did not bear the hallmarks of
21 real equity. They were not transferable, there was no
22 voting rights for three years, there was no real dividends
23 for three years once again, and then at once dividends, you
24 know, or dividend equivalents were given that was again
25 three years later, but those were simply more RSUs, more of

1 this facade. There was no legal title to ownership of any
2 stake in the company. You did not share in the, you know,
3 piece of the pie of the company for the next five years.

4 And moreover, going to the purchase element of
5 510(b), Your Honor, I think this is a -- I hope I can do a
6 good job explaining this because it's a bit nuance. But
7 there's a failure of consideration and because of that
8 there's no purchase in this scenario.

9 What I'm referring to is the fact that you receive
10 RSUs, let's say you receive RSUs in the year 2003. You work
11 and you exchange your services arguendo for those RSUs, so
12 you get a quid pro quo.

13 THE COURT: Right.

14 MR. BOYAJIAN: You give your services you get
15 those RSUs; however, you have to continue performing
16 services for Lehman for the next five years in order to get
17 the stock.

18 THE COURT: Right, and you were told that before
19 you worked day one as opposed to you work for a year where
20 you've been told that at the end of the year you're going to
21 get stock.

22 MR. BOYAJIAN: Right.

23 THE COURT: And then on New Year's Eve you get
24 called in by someone at Lehman and they say just kidding, in
25 fact we're changing it up.

1 That's not what happened here. And when I first
2 read the papers it seemed to me that you were arguing that
3 in the middle of the year or contrary to the going in
4 explanation of your deal, for example, pursuant to the dear
5 colleague letter, that then somebody said to you we told you
6 before that we were going pay you \$1 million in cash --

7 MR. BOYAJIAN: Uh-huh.

8 THE COURT: -- we changed our minds, even though
9 you've already worked 364 days, we're now going to not pay
10 you that \$1 million in cash, we're going to pay you \$900,000
11 in RSUs and \$100,000.

12 That's not what happened. What happened was your
13 going in deal said to you --

14 MR. BOYAJIAN: Right, we're not arguing there's a
15 breach of contract, Your Honor, but we're arguing that
16 there's a failure for consideration for all subsequent
17 years. Meaning if we even concede arguendo once again that
18 in 2003 you exchanged labor for RSUs, well going forward
19 what is your labor going for in 2004, 2005? Are you
20 exchanging your labor for the 2003 right to convert to stock
21 or are you exchanging your labor for the 2004, 2005 RSUs?

22 THE COURT: Both, because in 2003 when we gave you
23 the RSUs we told you that we're giving them to you subject
24 to all of the vesting and forfeiture provisions. So when
25 you got them, when we told you we were going to give them to

1 you they had those conditions on them and you kept working.

2 Yes, sir, can I help you?

3 MR. BOYAJIAN: But you had a --

4 MR. KAPLAN: May I address the Court, Your Honor?

5 THE COURT: I'm sorry?

6 MR. KAPLAN: May I address the Court as one of the
7 counsel for the representative claimants?

8 THE COURT: Well ordinarily I don't kind of have,
9 you know, play doubles, so --

10 MR. KAPLAN: Ordinarily I don't stand up, Your
11 Honor, but I do have a concern that I think is of interest
12 to the Court as well.

13 THE COURT: Well, but what's the -- so we're
14 coming up on an hour and 45 minutes, why don't you tell me
15 how the rest of the afternoon is going play out.

16 MR. KAPLAN: Well that's what I'm hoping to
17 explore, Your Honor --

18 THE COURT: Okay. Well --

19 MR. KAPLAN: -- because we have two -- we have two
20 witnesses ready to testify in the courtroom, two more on
21 call, and while I have great respect for my colleagues we're
22 not keeping to the schedule that we had agreed to
23 beforehand.

24 THE COURT: Well the fault is -- the fault is mine
25 because I'm not -- I'm not behaving, I'm not keeping quite.

1 (Laughter)

2 MR. KAPLAN: Your Honor has referred several times
3 to the three-hour limit and if we're not wedded to that
4 three-hour limit then I'll just sit back down and hold my
5 peace.

6 THE COURT: I appreciate it, and it's my fault
7 entirely, because if I kept quite then we would be more
8 keeping to the schedule.

9 MR. KAPLAN: Thank you, Your Honor. I'm sorry to
10 interrupt.

11 THE COURT: So --

12 MR. BOYAJIAN: I'll wrap up, Your Honor.

13 THE COURT: -- if you don't have -- I mean so far
14 -- and I mean this in the nicest possible way, I think
15 you're echoing largely what Ms. Solomon had to say. So is
16 there anything new or in addition that you wanted to --

17 MR. BOYAJIAN: Well, I think I was arguing that
18 these were illusory contracts, they're unenforceable. Yes,
19 I was echoing the fact that they're void as a matter of law.
20 It's not -- it's not a rescission claim here, we're not
21 asking anyone to rescind the contract, we're saying that
22 they were void and unenforceable to begin with.

23 THE COURT: So your client -- okay. So your
24 clients are then going to give back the money that they
25 earned?

1 MR. BOYAJIAN: Well that was a long time ago, that
2 was far beyond the statute of limitations.

3 THE COURT: Okay.

4 MR. BOYAJIAN: I mean that's not at issue here,
5 Your Honor, and you know, much of that stock has been sold
6 and who knows what's been done with it by now, but we're
7 addressing the 2003 to 2008 RSUs which -- most of which were
8 not vested, did not have voting rights, did not have
9 dividend equivalence awarded, and we're simply illusory
10 instruments with no consideration based on the preexisting
11 duty rule. The fact that you're exchanging your
12 consideration for one instrument you can't then give the
13 same consideration for multiple instruments going forward.

14 So these are -- you know, these are all
15 alternative arguments that we propose to the Court that
16 we're not raised in the Enron case and we kindly request
17 that the Court take the big picture in analyzing the 510(b)
18 provisions within the context of these broader laws.

19 One final note, Your Honor, on your point about
20 the cul-de-sac in 510(b). There is a way out of that cul-
21 de-sac. It's actually missing from Exhibit 1 of the
22 debtor's exhibits from this morning. On --

23 THE COURT: Okay.

24 MR. BOYAJIAN: -- it's noted page 19. So again,
25 this is the definition of a security. So they've -- we've

1 been discussing --

2 THE COURT: In the Code, the definition --

3 MR. BOYAJIAN: Yes.

4 THE COURT: Okay.

5 MR. BOYAJIAN: It's 11 U.S.C. 101.

6 THE COURT: Right.

7 MR. BOYAJIAN: So there's two parts to that test.

8 There's part (A) and part (B). Part (A) is inclusive.

9 THE COURT: Wait, are you in -- I'm not following
10 you. What section are you in? You're in 101?

11 MR. BOYAJIAN: Right, 101 U.S.C.

12 THE COURT: Right, 6 --

13 MR. BOYAJIAN: 11 U.S.C. 101.

14 THE COURT: Right, 16?

15 MR. BOYAJIAN: 49(A) and (B). Not equity
16 security.

17 THE COURT: Okay, I'm sorry.

18 MR. BOYAJIAN: The definition of security under
19 49.

20 THE COURT: Oh, oh, the term security.

21 MR. BOYAJIAN: Right.

22 THE COURT: Okay.

23 MR. BOYAJIAN: So I'm guessing this got cut off
24 the last page there, but there is a Section 7 under (B)
25 which is basically a way out if you have a debt claim for

1 the rendering of services.

2 THE COURT: Okay, I'm sorry, I don't -- I'm not
3 following what you're talking about. So I'm looking in 101,
4 right?

5 MR. BOYAJIAN: Yes.

6 THE COURT: Which section under 101?

7 MR. BOYAJIAN: 101(B). Okay, so you have --

8 THE COURT: No, there's no 101(B). So 101 --

9 MR. BOYAJIAN: I'm sorry, 101, 49 --

10 THE COURT: 49, right.

11 MR. BOYAJIAN: -- 49(B).

12 (Pause)

13 THE COURT: 101, 49(B), okay. Does not include --

14 MR. BOYAJIAN: Right.

15 THE COURT: -- right?

16 MR. BOYAJIAN: So even if an instrument does
17 qualify as a security under Subsection (A), and we're saying
18 it doesn't because of the Howie line of cases of investment
19 contract analysis --

20 THE COURT: Okay.

21 MR. BOYAJIAN: -- which applies to all of the
22 relevant definitions here, but even if it did then you can
23 kick it out under (B), and there's a missing subsection
24 number 7 which is not printed there, but to summarize --

25 THE COURT: But does not include --

1 MR. BOYAJIAN: Right. Let me see if I have it
2 here.

3 THE COURT: -- debt --

4 MR. BOYAJIAN: -- a debt or evidence of
5 indebtedness for services rendered is the relevant part.

6 THE COURT: Debt or evidence of indebtedness for
7 goods sold and delivered for services rendered.

8 MR. BOYAJIAN: It is our position that these --

9 THE COURT: Okay.

10 MR. BOYAJIAN: -- RSUs were an evidence of debt
11 for services rendered until they became convertible to
12 common stock.

13 THE COURT: Okay. I understand what you're
14 saying.

15 MR. BOYAJIAN: Thank you.

16 THE COURT: Okay. All right, what's next?

17 MR. KAPLAN: Well if Your Honor wants to take a
18 break we can take a break, if not I can open up on behalf of
19 the Lehman -- the Neuberger claimants.

20 THE COURT: The Neuberger Berman. Yeah, why don't
21 we keep going, okay?

22 MR. KAPLAN: Okay.

23 THE COURT: Mr. Michaelson, am I hearing from you
24 as well today?

25 MR. MICHAELSON: No, Your Honor.

1 THE COURT: I'll try to withhold my
2 disappointment.

3 MR. MICHAELSON: I hope you're sincere.

4 THE COURT: I am.

5 (Laughter)

6 MR. MICHAELSON: Thank you.

7 THE COURT: Just let me say, which I say in every
8 -- in every case, to the extend that there are claimants
9 here I find it useful every once in a while to let there be
10 a little humor in the proceedings to relieve the tension,
11 but you should in no way view that as my not taking this
12 very, very seriously, which I certainly do. But it's a hard
13 job for me and the lawyers and sometimes a little bit of
14 laughter helps get us through the day, so.

15 MR. KAPLAN: Thank you, Your Honor.

16 THE COURT: Okay.

17 MR. KAPLAN: And I left my --

18 THE COURT: I'm sorry?

19 UNIDENTIFIED SPEAKER: He said (indiscernible -
20 01:40:28) every day?

21 THE COURT: I can't -- I can't solve that problem.

22 (Laughter)

23 MR. KAPLAN: If Your Honor please, Eugene

24 Kaplan --

25 THE COURT: Yes.

1 MR. KAPLAN: -- for the Neuberger claimants.

2 The record as to the Neuberger claimants is set
3 out in the --

4 THE COURT: The separate --

5 MR. KAPLAN: -- declarations of Judith Kenny,
6 Henry Ramallo (ph), and Stephanie Stefo (ph), and the
7 supplemental declarations of Mr. Ramallo and Ms. Stefo.
8 Ms. Stefo, Mr. Ramallo, and Christian Reynolds are here in
9 the courtroom because --

10 THE COURT: Okay.

11 MR. KAPLAN: -- Mr. Miller has indicated that he
12 wants to cross-examine --

13 THE COURT: Okay.

14 MR. KAPLAN: -- with respect to their supplemental
15 declarations and the declaration of Mr. Ramallo.

16 THE COURT: Okay.

17 MR. KAPLAN: We also have exhibits, Neuberger
18 Berman A through O --

19 THE COURT: Right.

20 MR. KAPLAN: -- which I will -- which I will move
21 into evidence at an appropriate --

22 THE COURT: Okay.

23 MR. KAPLAN: -- moment. I'd move them into
24 evidence now if you'd like, but --

25 THE COURT: Okay.

1 MR. KAPLAN: -- if you're waiting till the end
2 we'll wait till the end.

3 THE COURT: Very good.

4 MR. KAPLAN: Neuberger Berman was a stand-alone
5 firm up until the merger in 2000 -- October 2003. So the
6 one thing that is clear is that none of the RSUs that were
7 granted to the Neuberger Berman people ever vested, because
8 they weren't granted for playing in 2003 on, they only had
9 two months or three months of 2003 --

10 THE COURT: Okay.

11 MR. KAPLAN: -- and then '04.

12 THE COURT: Okay.

13 MR. KAPLAN: The Neuberger Berman claimants here
14 were production-based employees. That depending on whether
15 they were a wealth manager like Ms. Kenny or an asset
16 manager like Mr. Schwartz and Mr. Ramallo, the percentage of
17 their compensation varied from say one percent to one and a
18 half percent per year of assets under management.

19 So how they were compensated was simply you would
20 look, for example, on December 31st how many -- what their
21 assets under management were and then the next three months
22 they would be paid whatever one and a half percent per year
23 of those were for each monthly installment.

24 THE COURT: Okay.

25 MR. KAPLAN: If they were a wealth manager it

1 would be one percent, more if they were an asset manager.

2 And what happened here was -- and that's the way
3 they were paid at Neuberger, but they were paid all in cash.
4 When they came to Lehman and all of a sudden they're
5 formulaic compensation instead of being paid all in cash was
6 now paid half in cash and half was deferred or taken out.

7 THE COURT: Okay. So you've been listening to the
8 -- so part of the arguments that have come before you are
9 the handcuff argument, right?

10 MR. KAPLAN: Right.

11 THE COURT: And so now what you're telling me is
12 that it was all cash when we were Neuberger Berman.

13 MR. KAPLAN: Right.

14 THE COURT: Then we became Neuberger Berman owned
15 by Lehman.

16 MR. KAPLAN: That's right.

17 THE COURT: And all of a sudden Lehman said no
18 more all cash, part cash, part stock.

19 MR. KAPLAN: Right.

20 THE COURT: Okay. So --

21 MR. KAPLAN: Changed the deal.

22 THE COURT: -- so let's go to the handcuff --

23 MR. KAPLAN: Right.

24 THE COURT: -- mode, right? Because at that point
25 what counsel have said so far is but I was handcuffed

1 because you started to pay me, you gave me this part RSU
2 deal and in order to get that stock I had to wait the five
3 years. So at the moment that there's the merger --

4 MR. KAPLAN: Right.

5 THE COURT: -- right, the Neuberger Berman folks
6 could say, I want to work for all cash, I'm not going do
7 this.

8 MR. KAPLAN: No, we couldn't. That's the
9 difference between the --

10 THE COURT: Okay.

11 MR. KAPLAN: -- Neuberger Berman claimants and the
12 other claimants.

13 THE COURT: Okay.

14 MR. KAPLAN: The Neuberger Berman claimants, who
15 were partners in Neuberger who then became managing
16 directors --

17 THE COURT: Of Lehman.

18 MR. KAPLAN: -- of Neuberger and then Lehman when
19 Neuberger went public --

20 THE COURT: Right.

21 MR. KAPLAN: -- they had in return for their
22 Neuberger stock, which then became Lehman stock -- not RSUs,
23 we're talking about stock.

24 THE COURT: Okay.

25 MR. KAPLAN: That's not at issue. They had to

1 sign three years restrictive covenants.

2 THE COURT: Uh-huh.

3 MR. KAPLAN: The other Neuberger claimants who
4 became managing directors either at Neuberger or at Lehman
5 also signed restrictive covenants.

6 THE COURT: I'm sorry, what's the difference
7 between these two groups?

8 MR. KAPLAN: There are four claimants who were
9 partners of Neuberger Berman before it became a public
10 entity.

11 THE COURT: Yes.

12 MR. KAPLAN: That when the IPO of Neuberger
13 happened --

14 THE COURT: Uh-huh.

15 MR. KAPLAN: -- and they switched from being
16 partners to managing directors --

17 THE COURT: All pre-Lehman, this is all pre-
18 Lehman.

19 MR. KAPLAN: All pre-Lehman, 1999.

20 THE COURT: Okay.

21 MR. KAPLAN: They in return for receiving founder
22 shares in Neuberger --

23 THE COURT: Yes.

24 MR. KAPLAN: -- signed restrictive covenants that
25 said that they could not compete or solicit for three

1 years --

2 THE COURT: Okay.

3 MR. KAPLAN: -- post their employment.

4 THE COURT: Okay.

5 MR. KAPLAN: At the time of the merger those four
6 people had to sign an amended stockholder agreement which
7 reiterated the three-year post employment --

8 THE COURT: Okay.

9 MR. KAPLAN: -- restrictive covenant --

10 THE COURT: Right.

11 MR. KAPLAN: -- in return for their Neuberger
12 share being converted to Lehman shares.

13 THE COURT: Okay. So stop there. So with respect
14 to those at that point in time what were the options of
15 those people? Not options in the stock sense.

16 MR. KAPLAN: The options were to sit on a beach
17 for three years.

18 THE COURT: Right. Or?

19 MR. KAPLAN: Or work at Lehman.

20 THE COURT: Subject to those conditions.

21 MR. KAPLAN: Subject to the three-year --

22 THE COURT: Okay.

23 MR. KAPLAN: -- covenant.

24 THE COURT: Okay.

25 MR. KAPLAN: The others had lesser restrictive

1 covenants while they were Neuberger employees because they
2 weren't partners.

3 THE COURT: Right.

4 MR. KAPLAN: And then those restrictive covenants
5 continued when they went --

6 THE COURT: To Lehman.

7 MR. KAPLAN: -- to Lehman.

8 THE COURT: Okay.

9 MR. KAPLAN: So they all, it is our position,
10 basically had no choice, they didn't -- you see we're not
11 asserting economic duress because Mr. Miller decided to
12 create a bar that he wants me to jump over. We're not
13 asserting that.

14 Judge Gonzalez made it clear that the standard is
15 conditions of employment that were willingly accepted. And
16 our position is that the Neuberger claimants didn't have a
17 choice. They either --

18 THE COURT: But you just told me that --

19 MR. KAPLAN: -- they could sit on a beach, which
20 is not -- which is not (indiscernible - 01:47:19) you can't
21 earn a living.

22 THE COURT: But the reason that they had the you
23 have to sit on a beach condition was because they had earned
24 so much and they were key employees of the firm.

25 So there is a choice, you're just saying they

1 didn't -- they didn't like the choice. This is not about
2 involuntary servitude, they just didn't like the choice that
3 they had.

4 MR. KAPLAN: Well, it's either -- yeah, it's give
5 up your livelihood and your career and the 40 years you've
6 put -- 40 some odd years you've put in the business the way
7 you want to continue to work or accept this dramatic change
8 in your pay structure --

9 THE COURT: Well but --

10 MR. KAPLAN: -- in which -- for which you have no
11 choice whether to accept it or not except sitting on a
12 beach.

13 THE COURT: Well, I just -- I'm trying to link
14 this up to the claims that are before me.

15 With respect to the four who had the three-year
16 covenant --

17 MR. KAPLAN: Right.

18 THE COURT: -- so they -- I just can't even
19 articulate what the claim is that they have that somehow
20 that that choice, the live on the beach or not choice is now
21 Lehman's problem. I just don't understand it. They -- they
22 were founding directors, they got founder shares, right?

23 MR. KAPLAN: Right. Founder shares are not at
24 issue here.

25 THE COURT: Okay. They then had signed up a

1 three-year restrictive covenant with Neuberger Berman,
2 right?

3 MR. KAPLAN: And then that was reiterated by
4 Lehman --

5 THE COURT: Okay. But at the moment that they
6 signed that up with Neuberger Berman Lehman was nowhere in
7 the picture.

8 MR. KAPLAN: Nowhere in the picture.

9 THE COURT: So that's got nothing -- that moment
10 of oh, we had no choice, that had nothing to do with Lehman
11 whatsoever.

12 MR. KAPLAN: That's right. But they also -- they
13 also at that point were being paid by formula dollar for
14 dollar by Neuberger Berman.

15 THE COURT: Okay.

16 MR. KAPLAN: Now Lehman, the merger takes place.
17 As a condition of the merger there is an amended and
18 restated stockholder agreement. The amended and restated
19 stockholder agreement carries forward three-year post
20 employment restrictive covenants.

21 THE COURT: Uh-huh.

22 MR. KAPLAN: And it says, this -- these
23 restrictive covenants are intended to prevent you from
24 working for --

25 THE COURT: Competitors.

1 THE COURT: -- in this industry.

2 THE COURT: Right.

3 MR. KAPLAN: So you now have a choice of sitting
4 on a beach for three years or accepting -- or going to work
5 for Lehman. You can't -- you got to give up -- so it's a
6 question of whether you give up everything that you've done
7 for 30 or 40 years in the business, give up your clients,
8 give up what you -- what you're livelihood is, or go work
9 under the terms that --

10 THE COURT: Okay. So --

11 MR. KAPLAN: -- that are being imposed on you.

12 THE COURT: -- so now we're in the cul-de-sac,
13 right?

14 MR. KAPLAN: Right.

15 THE COURT: So I -- those are the facts --

16 MR. KAPLAN: Right.

17 THE COURT: -- that's what occurred --

18 MR. KAPLAN: Right.

19 THE COURT: -- now what? Now because you were
20 unfairly forced to continue to work and make a salary,
21 albeit paid in part cash and part stock --

22 MR. KAPLAN: Right.

23 THE COURT: -- because of that now that Lehman
24 failed you get all cash. You get a claim because you were
25 unfairly coerced.

1 MR. KAPLAN: No, I --

2 THE COURT: That's a classic -- that's classic
3 equitable subordination.

4 MR. KAPLAN: No. What I have is as demonstrated
5 in 2008 where my clients were compensated for the money that
6 was deferred, which had been placed in trust, so we know
7 that the money is being taken out of their paychecks and
8 placed in trust during the course of the year that then --
9 Lehman then --

10 THE COURT: I'm sorry, what money are you talking
11 about now?

12 MR. KAPLAN: The half of the income that is of
13 their formulaic compensation that is being deferred, right?

14 THE COURT: They're getting paid --

15 MR. KAPLAN: They're getting paid \$10,000 a month.

16 THE COURT: Right.

17 MR. KAPLAN: So if they get 5,000 --

18 THE COURT: Right.

19 MR. KAPLAN: -- and 5,000 is deferred. The 5,000
20 that's --

21 THE COURT: Right.

22 MR. KAPLAN: -- deferred, according to the
23 documents that we have for 2008, was placed in trust
24 apparently so that at the end of the year these RSUs could
25 be purchased, but we never got to 2000 -- purchasing RSUs in

1 2008 so my clients were given their money for 2008 that had
2 been taken out, it was deferred, they were given the cash.

3 THE COURT: Not following you at all, sorry. I'm
4 just not following you at all. I don't -- I just don't --

5 MR. KAPLAN: In every year --

6 THE COURT: Yes.

7 MR. KAPLAN: -- they were paid a certain amount in
8 cash and a certain amount --

9 THE COURT: In --

10 MR. KAPLAN: -- was deferred.

11 THE COURT: But --

12 MR. KAPLAN: And at the end --

13 THE COURT: -- like in the compensation statements
14 that I've seen for the non-Neuberger Berman employees,
15 right? You got half -- you got some of your compensation in
16 cash and you --

17 MR. KAPLAN: It wasn't a bonus, it was just
18 formulaic commissions, right?

19 THE COURT: Okay.

20 MR. KAPLAN: Formulaic compensation.

21 THE COURT: Okay. But some of it was in cash and
22 some of it was in RSUs.

23 MR. KAPLAN: Some of it was deferred and at the
24 end of the year they were issued RSUs.

25 THE COURT: Okay. And going into -- on January 1

1 of a given year they knew going in that they were going to
2 go to work every day and sell or manage or whatever they did
3 and that part of their compensation would be given to them
4 in the form of cash and part of it would be given to them in
5 the form of RSUs, right?

6 MR. KAPLAN: Well I think would be deferred.

7 THE COURT: Okay, deferred. Okay.

8 MR. KAPLAN: But in --

9 THE COURT: But that wasn't a surprise to them,
10 right?

11 MR. KAPLAN: I suppose not.

12 THE COURT: Okay.

13 MR. KAPLAN: In 2008 --

14 THE COURT: Right.

15 MR. KAPLAN: -- the amounts were deferred --

16 THE COURT: Yes.

17 MR. KAPLAN: -- but because Lehman failed --

18 THE COURT: Yes.

19 MR. KAPLAN: -- and Neuberger did not --

20 THE COURT: Right.

21 MR. KAPLAN: -- they were paid the amounts of cash
22 that Lehman had withheld and had been deferred.

23 THE COURT: But -- okay. But this is where you
24 have me confused. When we've been talking about deferred up
25 to this point we've been talking about RSUs.

1 MR. KAPLAN: Right.

2 THE COURT: No one has been talking to me about
3 deferral of cash compensation. Are you -- do you mean that
4 the amount -- that the RSUs were cashed out? I don't --

5 MR. KAPLAN: No. The amount that was withheld
6 from the employees for -- that then became RSUs in years
7 2003, 2004, 2005 --

8 THE COURT: Yes.

9 MR. KAPLAN: -- '06, '07 --

10 THE COURT: Yes.

11 MR. KAPLAN: -- was cash, a specific amount, not a
12 bonus not anything else, it was just cash taken out of their
13 wages --

14 THE COURT: No, no, no.

15 MR. KAPLAN: -- that ultimately became --

16 THE COURT: No, hold on, hold on. It was not --
17 this is the part that it's very important. There's a
18 difference between saying that I'm going pay you \$1 million
19 a year in cash --

20 MR. KAPLAN: Right.

21 THE COURT: -- and then saying just kidding, I'm
22 going to withhold a half a million dollars a year, and
23 instead of that I'm going to give you an RSU, versus I'm
24 going to compensate you in the amount of \$1 million a year
25 and part of it's going to be in cash and part of it's going

1 to be in the form of a deferred compensation RSU. That's
2 not a withholding of cash, that's your -- that's your
3 compensation structure. Withholding is I get a paycheck,
4 the government withholds taxes. They take my cash from me.

5 MR. KAPLAN: Right.

6 THE COURT: That's not that the government is
7 saying just kidding, I'm not going pay you all in cash, I'm
8 going to pay you part in RSUs. So when you're saying that
9 the amount that was withheld was then -- I'm sorry, maybe
10 I'm getting tired, but I'm just not following what you're
11 saying.

12 MR. KAPLAN: When they were -- when Neuberger was
13 a stand-alone entity --

14 THE COURT: Right.

15 MR. KAPLAN: -- they were paid --

16 THE COURT: In cash.

17 MR. KAPLAN: -- on a formula in cash.

18 THE COURT: Right.

19 MR. KAPLAN: One hundred percent in cash.

20 THE COURT: Right.

21 MR. KAPLAN: In 2008 they were paid half in
22 cash --

23 THE COURT: Right, and half in --

24 MR. KAPLAN: -- and half was deferred, placed in
25 trust, and in 2009 they were paid that cash, they were paid

1 money.

2 It's our argument that the same is true for the
3 amounts that Mr. Twotso (ph) shows on his schedule as having
4 been deducted that they say they were invested in RSUs, it
5 was their compensation, their commissions, their production-
6 based earnings that they earned, and some of it was taken by
7 Lehman out of their paychecks on a monthly basis when they
8 got paid and withheld from them, and at the end of the year
9 Lehman invested that or put that into RSUs.

10 But all of this goes back to the notion that my
11 clients did not have, because of the restrictive covenants
12 that handcuffed them, they did not have a choice but to
13 accept this compensation.

14 THE COURT: Okay. You've just -- you've just
15 mixed up apples and oranges, and I'm sorry, I'm just not
16 following you.

17 In -- when the merger occurred --

18 MR. KAPLAN: Yes.

19 THE COURT: -- you just said something like the
20 amount of the deferred RSUs were paid in cash. You just
21 said something like that, that they were paid in cash. Is
22 that not what you said?

23 MR. KAPLAN: No, I said prior to the merger my
24 clients were paid in cash, and in 2008, the year that Lehman
25 filed for bankruptcy --

1 THE COURT: Right.

2 MR. KAPLAN: -- the amount that was deferred --

3 THE COURT: Yes. Was?

4 MR. KAPLAN: -- that would have been I suppose, if
5 Lehman had survived --

6 THE COURT: Yes.

7 MR. KAPLAN: -- to the end of the year --

8 THE COURT: Right.

9 MR. KAPLAN: -- that amount of cash that was
10 deferred and placed in trust during the course of the
11 year --

12 THE COURT: It wasn't cash that was deferred and
13 placed in trust, there was no cash that was deferred and
14 placed in trust.

15 MR. KAPLAN: Of course there was. There's a memo
16 that's in evidence, Exhibit N, that says your money that's
17 been deferred has been placed in trust and you're going to
18 get it.

19 THE COURT: Would you show that to me?

20 MR. KAPLAN: Sure.

21 THE COURT: What you said before is that somebody
22 got cash.

23 MR. KAPLAN: Question, "If part of my production
24 compensation was deferred ..." -- this is Neuberger
25 Berman N.

1 THE COURT: Right.

2 MR. KAPLAN: "If part of my production
3 compensation was deferred under the" --

4 THE COURT: Right.

5 MR. KAPLAN: -- "Lehman Brother equity award
6 program" --

7 THE COURT: Right.

8 MR. KAPLAN: -- "will I receive any of that
9 compensation?"

10 THE COURT: And well --

11 MR. KAPLAN: "If you receive production
12 compensation throughout the year and have had compensation
13 deferred under Lehman" --

14 THE COURT: Right.

15 MR. KAPLAN: -- "Brother equity award program
16 those deferrals have been placed in trust with Wells Fargo."

17 THE COURT: Okay.

18 MR. KAPLAN: You don't put RSUs in trust with
19 Wells Fargo, you put money in trust with Wells Fargo.

20 THE COURT: If you receive production compensation
21 throughout the year and had compensation deferred --
22 compensation deferred under the Lehman Brothers equity award
23 program --

24 MR. KAPLAN: That's the RSU program.

25 THE COURT: That's the RSU program. Those

1 deferrals have also been placed in trust with Wells Fargo.

2 Are you telling me that that sentence means that
3 there was cash?

4 MR. KAPLAN: Absolutely, and they were paid the
5 cash in January, and they were paid in January that cash.

6 THE COURT: You will soon receive --

7 MR. KAPLAN: And that's despite the fact that
8 Lehman Brothers granted interim RSUs in July.

9 THE COURT: I'm going to be very honest with you.
10 I still do not know what you're talking about. I just
11 don't. I don't. Maybe someone else can help me out here,
12 but I --

13 MR. KAPLAN: I've got two Neuberger people who are
14 -- got their hand raised.

15 THE COURT: I just don't understand, and maybe
16 Mr. Miller can help me clarify here.

17 Please, put your hands down. Okay?

18 Help me with the predicate facts. Were these
19 folks paid cash, cash, cash during the bankruptcy in January
20 2009?

21 MR. KAPLAN: Yes, because they weren't --
22 Neuberger wasn't bankrupt. Neuberger was not a bankrupt
23 subsidiary. So they were able to be paid cash.

24 THE COURT: If you'll indulge me.

25 MR. KAPLAN: Yes.

1 THE COURT: And let me ask Mr. Miller what the
2 answer is. All right?

3 MR. KAPLAN: Sure.

4 MR. MILLER: Yes, Your Honor, the answer is yes,
5 but you need to understand that Neuberger was in the process
6 of being sold.

7 THE COURT: Yes, Neuberger was --

8 MR. MILLER: In November of 2008, it was being --

9 THE COURT: -- sold out of the bankruptcy, right?

10 MR. MILLER: -- stalled in the bankruptcy.

11 THE COURT: Right.

12 MR. MILLER: And there were actually competing
13 bids at this time. This is all public information.

14 THE COURT: Right, in the bankruptcy?

15 MR. MILLER: In the bankruptcy context --

16 THE COURT: Neuberger was an asset of Lehman. It
17 was being sold, right?

18 MR. MILLER: Right.

19 THE COURT: Okay.

20 MR. MILLER: And Neuberger management made a
21 decision, which we believe we can show was for retention
22 purposes --

23 THE COURT: Okay.

24 MR. MILLER: -- to pay this deferred compensation
25 --

1 THE COURT: Right.

2 MR. MILLER: -- in cash. It was done by Neuberger
3 --

4 THE COURT: This is the part of the story that you
5 weren't telling me.

6 MR. MILLER: -- Berman.

7 THE COURT: The part of the story that -- you were
8 leading me down this path of because it was paid in 2009,
9 that means that this same compensation is payable for
10 previous years, but what you neglected to get into -- maybe
11 you were going to -- is that this was part of a deal around
12 the sale of Neuberger Berman. These individuals getting
13 something to which they were not otherwise entitled.

14 MR. KAPLAN: Well, we don't know that they were
15 not otherwise entitled.

16 THE COURT: Okay, but the fact that -- but my
17 point is --

18 MR. KAPLAN: Mr. Miller says they're not otherwise
19 entitled.

20 THE COURT: Okay, but that's what we're here to
21 decide, but the fact that, as part of -- you have a memo
22 dated November 17th, 2008, which I guess was -- it's heavily
23 redacted.

24 MR. KAPLAN: But the redactions do not, with
25 respect, do not relate to anything --

1 THE COURT: Okay. That's --

2 MR. KAPLAN: -- having to do with this issue.

3 THE COURT: -- fine. That's fine, but my point is
4 that, if this is a Q&A that's being given to Neuberger
5 employees to explain what's happening to them, --

6 MR. KAPLAN: That is true.

7 THE COURT: Right? And it reflects that, as part
8 of the deal, these folks were going to get this payment.
9 That's not dispositive, may not even be probative of what
10 was required. All the time there are particular
11 arrangements that get negotiated as part of the sale of
12 assets in or out of bankruptcy.

13 MR. KAPLAN: This was months before the sale of
14 the assets. The Q&A there has absolutely nothing to do with
15 the sale of assets. I would be glad to give Your Honor a
16 copy.

17 THE COURT: Okay.

18 MR. KAPLAN: An unredacted copy. It talks about
19 what happened to my medical benefits, and am I going to be
20 reimbursed for my travel expenses.

21 THE COURT: Okay.

22 MR. KAPLAN: But --

23 THE COURT: All right. Why don't we keep going?
24 And at least I now understand. I think the problem arises
25 from we have a lot of words that have multiple meanings.

1 Compensation, payment, deferral -- and that's where my
2 confusion arises. So I now understand that you mean that
3 these individuals were paid cash, cash in January of 2009.
4 That's what you mean.

5 MR. KAPLAN: For the deferrals that took place
6 while Lehman was in charge --

7 THE COURT: Okay.

8 MR. KAPLAN: -- in 2008.

9 THE COURT: I got it. Okay. Very good. Thank
10 you.

11 MR. KAPLAN: And --

12 THE COURT: And that therefore, because now they
13 still have RSUs --

14 MR. KAPLAN: That were deferred or --

15 THE COURT: -- that were deferred --

16 MR. KAPLAN: -- that came from wages that were
17 deferred on exactly the same basis.

18 THE COURT: Right. That therefore, they should
19 get cash for them.

20 MR. KAPLAN: They should get cash for them.

21 THE COURT: Okay. At least I understand what
22 you're arguing now.

23 MR. KAPLAN: And our argument additionally is that
24 we needn't reach the burden of economic duress of having
25 someone holding a gun to these claimants' head in order to

1 get them to work for Lehman. It is enough that they did not
2 -- because of the handcuffs imposed by the restrictive
3 covenants and the further handcuffs imposed --

4 THE COURT: Okay.

5 MR. KAPLAN: -- by the vesting period, --

6 THE COURT: Right. That --

7 MR. KAPLAN: -- that they did not willingly accept
8 the RSU program, that it was forced on them as a condition
9 of employment, and therefore, they are not willing
10 purchasers. The purchase has to be a volitional act.

11 THE COURT: So -- okay. So --

12 MR. KAPLAN: And they did not act volitionally.

13 THE COURT: So in the years prior to the
14 bankruptcy, --

15 MR. KAPLAN: Right.

16 THE COURT: Right? Did anybody sue? Nobody
17 complained. They just worked --

18 MR. KAPLAN: Nobody complained, because the law in
19 New York is --

20 THE COURT: No, because they --

21 MR. KAPLAN: -- you don't have to complain,
22 because they were always subject to the restraints of the --
23 since these were post-employment restrictive covenants, they
24 couldn't complain without triggering the restrictive
25 covenant. There's a case called Soznoff (ph), which we've

1 cited --

2 THE COURT: Yeah.

3 MR. KAPLAN: -- in our brief which says that you
4 don't have to complain while you're under the same
5 obligations, and they continued throughout to be under these
6 restrictive covenants, and therefore, there was no
7 obligation for them to complain.

8 THE COURT: Okay.

9 MR. KAPLAN: With that, I guess we have our
10 witnesses here subject to cross-examination.

11 THE COURT: Okay. Very good.

12 MR. KAPLAN: If Mr. Miller wants to proceed.

13 THE COURT: Okay.

14 Are you folks okay with continuing on without a
15 break, or would you like a break?

16 MR. MILLER: LBHI is planning to go forward,
17 Your Honor.

18 THE COURT: I'm sorry?

19 MR. MILLER: This is Ralph Miller again. LBHI is
20 planning to go forward, if you'd like to.

21 THE COURT: Okay. All right.

22 Is there any more argument on this side, or are we
23 ready to go?

24 MR. KAPLAN: No, I think we're finished with
25 argument.

1 THE COURT: All? Okay. All right.

2 And how many witnesses are we going to have?

3 MR. MILLER: We have cross-examination of

4 Ms. Stiefel and Mr. Ramallo and --

5 THE COURT: Okay.

6 MR. MILLER: And then, Mr. Reynolds, if I feel it
7 appropriate.

8 THE COURT: Okay.

9 MR. MILLER: And then, Mr. --

10 THE COURT: And is there anyone on the phone --

11 MR. MILLER: Mr. Schager has some witnesses as
12 well.

13 THE COURT: Okay. And I'll --

14 MR. MILLER: Then he has to present his direct,
15 and then, --

16 OPERATOR: Your Honor, this is Court Call. I
17 don't have anyone connected.

18 THE COURT: There's no one connected. Okay.
19 Thank you.

20 OPERATOR: Thank you.

21 MR. SCHAGER: Hold on. Sorry. We are to have
22 someone connect Court Call shortly to London (sic), if we
23 want his testimony.

24 THE COURT: Well, --

25 MR. SCHAGER: And the relevance of his testimony

1 was that he was an overseas --

2 THE COURT: Okay.

3 MR. SCHAGER: -- employee who was awarded CSAs.

4 THE COURT: Is that person standing by?

5 MR. SCHAGER: He was standing by, and he was going
6 to call in at 3:30.

7 THE COURT: Oh, I see. Okay.

8 MR. SCHAGER: But, as to that other -- I've got
9 two witnesses in the courtroom, and our understanding
10 beforehand was that we would proceed with the direct
11 testimony before we got involved with the --

12 THE COURT: Okay.

13 MR. SCHAGER: -- cross-examinations.

14 THE COURT: Okay.

15 MR. SCHAGER: And, if that's acceptable to the --

16 THE COURT: That's fine.

17 MR. SCHAGER: -- Court, --

18 THE COURT: Mr. Miller?

19 MR. MILLER: Yes, Your Honor.

20 THE COURT: That's fine, right?

21 MR. MILLER: Yes, that's fine with LBHI,
22 Your Honor.

23 THE COURT: Okay. All right.

24 So, just on the claimant's side, I'm just ready to
25 hear whoever your first witness is. I'm ready to hear them.

1 MR. KAPLAN: Okay. Your Honor, I would like to
2 call Sandy Fleishman --

3 THE COURT: I'm sorry. Is there a confusion over
4 here?

5 MR. KAPLAN: No, I don't know, Your Honor. Since
6 I put the declarations in as our direct, --

7 THE COURT: Right.

8 MR. KAPLAN: -- I don't know if Mr. Miller wants
9 to do his cross, or if Mr. Schager wants to --

10 THE COURT: Well, why don't we complete your case
11 in chief, right, which would be the live direct? And then,
12 Mr. Miller can cross everybody. Doesn't that make some
13 logical sense?

14 MR. MILLER: You mean cross -- I assume witnesses,
15 Your Honor?

16 THE COURT: Yes.

17 MR. MILLER: Yes, that's fine with us, Your Honor.
18 We would like to sort of know what the order is coming so we
19 can get ready.

20 THE COURT: Okay. I'll tell you what. Here's
21 what we're going to do. We're going to take a five-minute
22 break, and you all talk to each other, and however you
23 decide you want to do it is fine with me. All right? So
24 let's take a five-minute break, and then, we'll keep going.
25 All right? Okay.

1 (Pause)

2 MR. KAPLAN: The issue has come up that, since --

3 THE COURT: Okay.

4 MR. KAPLAN: -- all of these claimants have missed
5 their day at work because we've been here, --

6 THE COURT: Yes.

7 MR. KAPLAN: Can we manage to go --

8 THE COURT: We can.

9 MR. KAPLAN: -- 'til 5:00 or so and get this done?

10 THE COURT: Absolutely, absolutely. The time
11 problem is my fault, because I asked a lot of questions. So
12 I'm certainly not going to make that -- give these folks the
13 opportunity to testify. So I've been going 'til 8:00 at
14 night on this other little trial that I've had every day.
15 So 5:00 is still going to be an early day for me. So --

16 MR. KAPLAN: Well, maybe it would go a little bit
17 long. Whatever -- as long as we can get them all on today.

18 THE COURT: Yes, yes.

19 MR. KAPLAN: I think, yes, that would be fine.

20 THE COURT: And can you just give me an idea of
21 what's going to happen tomorrow? I know that tomorrow is
22 the folks that you don't represent.

23 MR. KAPLAN: That's right.

24 THE COURT: But, Mr. Miller, do you have some idea
25 of what exactly is going to happen tomorrow?

1 MR. MILLER: Well, Your Honor, it is reserved for
2 pro ses. I think obviously one possibility is I don't
3 really see how we're going to get all these witnesses. I
4 was told the typical testimony was going to be half an hour.
5 That's two hours and not much time for cross. So there may
6 be some carryover, --

7 THE COURT: All right. So let's --

8 MR. MILLER: -- if we have to have that.

9 THE COURT: Okay.

10 MR. MILLER: But I don't think we know how many
11 pro ses are going to want to speak.

12 THE COURT: So you don't know?

13 MR. MILLER: We don't know that.

14 THE COURT: You don't know?

15 MR. MILLER: Maybe they have some indication.

16 THE COURT: Ms. Solomon?

17 MS. SOLOMON: Your Honor, actually, I've been
18 retained by a pro se. So I intended to address his argument
19 tomorrow during oral argument, and I know of one other pro
20 se, but I --

21 THE COURT: Okay. Well, that person's no longer a
22 pro se then. They're retained by you. So it's kind of --

23 MS. SOLOMON: They are, but they had made an
24 argument in their brief that was not addressed today. So I
25 thought it was more appropriate to address tomorrow, and

1 that has to do with the Lehman sales commissions that were
2 never converted into RSUs.

3 THE COURT: Okay. All right. So I guess for
4 tomorrow we're just going to wait and see. So perhaps the
5 best thing to do is just to start. Yeah.

6 MR. SCHAGER: Your Honor, there was one other
7 piece of information that I could offer.

8 THE COURT: Sure.

9 MR. SCHAGER: My understanding is that there are
10 at least three people prepared to speak tomorrow. Two of
11 them are here in court today. Now, I'm not aware of what --
12 I don't know whether the Court has received any other calls,
13 but I'm aware of three people who intend to speak tomorrow.

14 THE COURT: We had gotten a number -- we have
15 gotten no calls. We had gotten a couple of calls asking for
16 permission to testify or appear telephonically, and we
17 granted all of them, but, that being said, I don't know who
18 actually intends to call in. So --

19 MR. SCHAGER: Okay.

20 THE COURT: All right. So why don't we get
21 started and see how far we get? And, once again, to the
22 extent that we're running late because I've been asking too
23 many questions, then we'll figure out a way to fix that.
24 All right?

25 MR. SCHAGER: Okay. Your Honor, I propose to have

1 four witnesses, three by telephone. Sorry. It's Richard
2 Schager.

3 When we first spoke with Judge Peck about this
4 case more than two years ago, he outlined several different
5 groups and wanted them addressed. One was people paid --
6 U.S.. residents paid on a salary/bonus basis.

7 THE COURT: Right.

8 MR. SCHAGER: U.S. residents paid on a production
9 basis or a commission basis.

10 THE COURT: Right.

11 MR. SCHAGER: Overseas persons paid with
12 contingent stock awards or CSAs and then, the diverted
13 Berman group. I have witnesses for each of those first
14 three groups.

15 THE COURT: Okay.

16 MR. SCHAGER: I think Weil Gotshal and I -- or I
17 should say Lehman and the represented claimants agreed that
18 the situation between the restricted stock units and the
19 contingent stock awards is not dramatically different.

20 THE COURT: Okay.

21 MR. SCHAGER: I have one witness I thought would
22 walk through the compensation statement in which the Court
23 has shown some interest.

24 THE COURT: Okay.

25 MR. SCHAGER: But, you know, it's time, and it

1 might not be necessary, but it's sufficiently interesting,
2 illustrated by the testimony of the restricted stock award
3 person in the U.S. who was paid on the salary/bonus basis.
4 The forms are fairly similar.

5 THE COURT: Okay. Well, I suppose that I don't --
6 I'm trying to think out loud a little bit. I mean, if
7 counsel essentially agrees that there aren't material
8 differences and there's no need for additional testimony
9 regarding the other type of instrument, then I'm prepared to
10 go along with that. I just don't want to say that we
11 shouldn't have the other category of person testify and then
12 somehow I get told that I made an unsupported factual
13 finding with respect to the nature of the RSU versus the
14 CSA.

15 MR. SCHAGER: Okay.

16 THE COURT: Do you know what I'm saying?

17 MR. SCHAGER: Right.

18 THE COURT: I mean, if you need both, you need
19 both. So we'll have to do both, but, if one can stand as
20 describing the other and no one's going to object to that,
21 then I'll do that as well.

22 MR. SCHAGER: Okay. May I ask with the speaker --
23 do we have Michael Gran on the phone?

24 Apparently not. So --

25 OPERATOR: Your Honor, this is Court Call. We do

1 have Michael Gran, and his line is open.

2 THE COURT: Okay.

3 Mr. Grand -- is it Grand?

4 MR. SCHAGER: Gran, G-R-A-N.

5 THE COURT: Mr. Gran, are you there?

6 MR. GRAN: Yes, I am.

7 THE COURT: All right.

8 Now, you're going to examine, illicit testimony
9 from Mr. Gran?

10 MR. SCHAGER: That's correct, Your Honor.

11 THE COURT: All right.

12 Then, Mr. Gran, I'm going to administer the oath
13 to you. Can you hear me?

14 MR. GRAN: I can hear you.

15 THE COURT: All right.

16 (Witness Sworn)

17 THE COURT: All right. Please try to keep your
18 voice up as much as you can.

19 THE WITNESS: Okay.

20 DIRECT EXAMINATION

21 BY MR. SCHAGER:

22 Q Thank you, Mr. Gran, for making yourself available
23 tonight, and, Mr. Gran, we're going to be very quick because
24 of your schedule and the Court's. Could you describe for us
25 your employment at the time you worked at Lehman Brothers?

1 Can you hear me, Mr. Gran?

2 A I'm afraid it's very difficult to hear.

3 THE COURT: Your microphone should be -- right.

4 MR. SCHAGER: Okay.

5 BY MR. SCHAGER:

6 Q Sorry, Mr. Gran. Can you hear me now?

7 A I can hear you a little bit better now.

8 Q Okay. Thank you. Can you tell us when you worked at
9 Lehman Brothers?

10 A Sure, I worked at Lehman Brothers, in fact, on two
11 separate occasions as an assistant analyst (sic) in 2006
12 through 2008.

13 Q Can you describe for the Court your work during those
14 years, 2006 to 2008?

15 A Certainly, I was there to work on setting up a new
16 policy (sic) about the management group and entities, and we
17 did that successfully and just from scratch started to
18 manage money for large institutions in Europe.

19 THE COURT: I'm going to interrupt you for a
20 moment, because I need to make sure this is actually being
21 recorded.

22 Francis, are you getting it?

23 THE RECORDER: Yes.

24 THE COURT: Okay.

25 Okay. Go ahead.

1 BY MR. SCHAGER:

2 Q Did you continue working at Lehman Brothers after the
3 bankruptcy?

4 A Hello?

5 Q Yes, Mr. Gran. Did you continue working at Lehman
6 Brothers after the bankruptcy?

7 A Yes, I was working -- you know, I continued with that
8 role, because the money was still being managed back to the
9 bankruptcy event, and the arrangement was the fact that I
10 was, in effect, working with Lehman Brothers administration
11 and paid by them through 2009 when the final separation
12 happened.

13 Q Mr. Gran, have you had an opportunity to review your
14 proof of claim as it appears on the Epiq website?

15 A I reviewed it.

16 MR. SCHAGER: In each case, Your Honor, we have
17 the proof of claims attached to a declaration, and, in this
18 case, we do not. This is a proof of claim that has been
19 marked CLX089, CLX089, and I would like to -- this would be
20 offered into evidence.

21 THE COURT: Okay.

22 BY MR. SCHAGER:

23 A Mr. Gran, do you have a copy of your proof of claim
24 available to you now?

25 A Yes, I have it beside (sic) me.

1 Q Okay. I would like you to turn to the page marked page
2 three of four.

3 A Page three of four? Okay.

4 Q This is a type of letter, Mr. Gran, that we have
5 elsewhere in the record, as you and I have discussed
6 separately. Can you describe for me the significance of
7 this form to you?

8 THE COURT: I'm sorry to interrupt. Still
9 struggling with this.

10 MR. SCHAGER: Your Honor, may I approach and offer
11 --

12 THE COURT: I see this ends at CLX86. Am I
13 missing something?

14 MR. MILLER: Your Honor, for LBHI, we don't have a
15 copy of 89, either.

16 MR. SCHAGER: I apologize, Your Honor.

17 MR. MILLER: So --

18 THE COURT: Okay.

19 MR. MILLER: -- we need a copy as well (sic).

20 THE COURT: All right.

21 You could hand that up. That would be great.

22 MR. SCHAGER: I do have copies, Your Honor. I
23 apologize.

24 (Pause)

25 BY MR. SCHAGER:

1 Q Mr. Gran, I'd like you to turn to page three of four of
2 your proof of claim. That's the document entitled the 2007
3 total compensation statement.

4 A Can you speak up?

5 Q Yes, it's a document entitled 2007 total compensation
6 statement. That's page three of four, page three of four of
7 your proof of claim.

8 A Yes.

9 Q Okay. Now, --

10 A Page three of four.

11 Q Great. Thank you. This form is dated, in your case,
12 December 13, 2007, Mr. Gran. Did you receive a --

13 A Right.

14 Q -- a form like this every year at that time?

15 A It looks like the normal form for the letter (sic),
16 yes.

17 Q And what was the significance of the form to you?

18 A What was the -- I'm sorry?

19 Q What did the form illustrate to you?

20 A The form illustrated a breakdown of private
21 compensation with the compensations both between salary,
22 bonus, and the different compensation as what (indiscernible
23 - 2:21:00) award.

24 Q Of your total compensation, Mr. Gran, as shown on this
25 form, what portion was your contingent stock award as

1 opposed to your total -- what portion of your total
2 compensation was your contingent stock award?

3 THE COURT: Mr. Gran, did you hear the question?

4 THE WITNESS: No, I didn't hear anything. It was
5 silent.

6 THE COURT: Could you repeat the question again?

7 MR. SCHAGER: Yeah.

8 THE WITNESS: The line is silent.

9 BY MR. SCHAGER:

10 Q Sorry. Mr. Gran, does this microphone work a little
11 better?

12 A Yes, that's better. Hello?

13 Q Okay. Okay, Mr. Gran. I hope this works a little
14 better. The total compensation as shown on this form from
15 December 13, 2007 is \$750,000. Your bonus is shown -- your
16 total bonus is shown as 481,000, and then, the equity award,
17 so-called, the contingent stock award is shown as 129,000.
18 If I run those numbers, I believe the equity award was about
19 -- sorry -- about 27 percent of your claim. Was that pretty
20 much an average equity award for you?

21 A Well, I guess it's hard to say. The average is not
22 really typical, but I can say (indiscernible - 2:23:15)
23 Lehman Brothers. This would have been on the low side in
24 terms of percentage.

25 Q Okay. Now, I'm going to ask you to flip the page

1 backwards, Mr. Gran, to page two of four.

2 A Okay.

3 Q Can you explain to me, please, what this letter is?

4 This is a letter called personal award statement.

5 A Yes, each of the heads of this group (indiscernible -
6 2:23:49) I was a member of (indiscernible - 2:23:51)
7 primarily because of the product we made (sic) was quite
8 substantial, but the organization wanted to pay us this way
9 and try to lock us in for a longer period of time and
10 continue trying to build this business, which we'd already
11 invested in my company, and my response (sic) to them to
12 that was it was a special award which was outside of the
13 bounds of their normal compensation schemes that they do as
14 standard, which is what the other letter which you just
15 described illustrated.

16 Q Okay.

17 A So --

18 Q Mr. Gran, if I could interrupt, I think a little
19 background might be helpful. Can you describe the business
20 that you were building that's the subject of page two of
21 four of your proof of claim?

22 A Yes, we established a new financial (sic) company and
23 financial products. We listed a number of products in
24 Paris, and we also established some individual investment
25 units (sic) with some large pension plans, and that all

1 happened in a very short period of time in that previous
2 year of this award.

3 Q Is it correct to say then, Mr. Gran, that you went back
4 to work at Lehman Brothers in 2006 and were working on a
5 special project for which you received a \$1 million bonus at
6 the end of 2007?

7 A That's correct.

8 Q And that bonus is included in your proof of claim?

9 A Yes, it was.

10 Q Okay. Mr. Gran, can you describe for us your general
11 compensation arrangements? Were you paid typically on a
12 commission basis or a salary/bonus basis?

13 A (Indiscernible - 2:55:54) on the salary/bonus basis.

14 Q And what was your base salary?

15 A The base salary was 185,000 (sic) pounds, which at that
16 time was \$68,000.

17 Q Okay. Now, of your total compensation, roughly what
18 portion was your salary? This is not the bonus. This is
19 what portion was your salary.

20 A Of total compensation, excluding the special award?

21 Q Yes, sir, excluding the special award, please.

22 A The salary was about 36 percent of total compensation.

23 Q All right. Now, I'd like to talk about taxes just for
24 a minute, Mr. Gran. Again, referring to page three of your
25 proof of claim.

1 A Okay.

2 Q The proof of claims shows a total compensation of
3 \$750,000 or 337,000 pounds with a portion called equity
4 award of -- I guess we'll just use the dollars -- \$129,000.
5 Did you pay withholding tax in the United Kingdom on this
6 compensation?

7 A No, because we didn't actually receive anything. Just
8 received the writing (sic) for something in the future. So
9 testing (sic) for compensation at that time, in fact, then
10 you didn't have to pay a tax in the U.K.

11 Q But you did pay tax on the paid salary; is that
12 correct?

13 A On salary and cash bonus, yes.

14 Q On the salary and on the cash bonus? Okay. Mr. Gran,
15 when you -- when were you first awarded contingent stock
16 awards?

17 A Well, first, in fact, would have been during my time
18 working at Lehman Brothers, which would have been probably
19 in 1997.

20 Q You worked at Lehman in 2001; is that correct?

21 A Yes, I actually was -- I had left in 2001 at that
22 point, but I was still there in the beginning of 2001.

23 Q Did you get a contingent stock award for the year 2000?

24 A I did.

25 Q In 2006, did that award convert to stock?

1 A Well, I thought the conversion was accelerated because
2 I was what they called a good leader, and so, I was allowed
3 to have that compensation sooner than the normal time for
4 it, five-year duration.

5 Q Very good. And what tax did you pay on the stock when
6 it was converted?

7 A Well, my recollection is that I received shares, but
8 the shares' quantity was reduced by the withholding tax.

9 Q And the withholding tax -- sorry. Withdrawn. In the
10 United Kingdom, is there a bifurcated tax rate as we have
11 here with some gain tax, like capital gain rates so-called
12 and some tax paid at ordinary income rates?

13 A Yes, and this was treated entirely as ordinary income.

14 Q Was the market price of the stock higher when you
15 received it than it was at the time of the RSU grant?
16 Sorry, the contingent stock award grant?

17 A I believe so.

18 Q Now, did you pay any of the tax at capital gain rates?

19 A No.

20 Q Okay.

21 A It was all ordinary income.

22 Q Okay. And I think we'll agree --

23 A The basis for tax purposes would have been the price at
24 the time that you received the actual shares after the
25 conversion. So you wouldn't pay tax on any gains based on

1 what the guy (sic) happened to be when they issued the CSA,
2 which is something that you could convert later.

3 Q Right. Thank you. Now, Mr. Gran, let me ask about the
4 nature of the RSUs during the -- the CSAs, the contingent
5 stock awards at the time you held them. Do you have any
6 recollection of being asked to vote those contingent stock
7 awards?

8 A No, I don't remember being asked to vote.

9 Q Do you recall being given an opportunity or a proxy
10 statement to vote the contingent stock awards?

11 A No, I've never been given the option to do that on an
12 annual basis. I would have remembered that.

13 Q Mr. Gran, I would like you to think about the year --
14 sorry, the month January 2008. You've described your
15 special project that you were brought in for, and you
16 described for us your special \$1 million CSA bonus awarded
17 in November of 2007. Let me ask this. The skills that you
18 had in developing that project -- were those skills that
19 would have been attractive to another investment bank in
20 London, Barclays or Goldman Sachs or Morgan Stanley?

21 A In principle, yes.

22 Q If you had been offered a job by Barclays or Morgan
23 Stanley at that time, what would it have cost you to leave
24 Lehman Brothers?

25 A More than likely, I would have to give up all of the

1 CSAs, the entire amounts. So the amount of my claim is
2 that.

3 Q And that's \$1.2 million?

4 A Yes.

5 Q Mr. Gran, you said you continued to work for Lehman
6 Brothers when it went into administration in 2008. Can you
7 describe for the Court's benefit in a little more detail
8 what your responsibilities involved? The lines are working
9 better now, and I think your comments are coming through
10 clearly.

11 A Well, I was involved in ensuring that we retain and
12 increase the amount of assets that we had within the
13 balancing (sic) period (sic). That was the primary
14 responsibility, but also oversight over how the funds are
15 managed and research for additional funds in the future.

16 Q Now, one of the assets that you're referring to was the
17 special project in which you were involved from 2006 to
18 2008; is that correct?

19 A That's correct.

20 Q And what happened to that project?

21 A I continued doing the same.

22 Q I'm sorry. I interrupted you. Go ahead.

23 A Go ahead. Sorry.

24 Q And what happened to that special project during those
25 years?

1 A Between 2006 and 2008?

2 Q After the bankruptcy.

3 A Oh, after the bankruptcy, one of the individuals who is
4 the head of the group was allowed to purchase the company,
5 which we had created in France and continued the operation.

6 Q So the Lehman Brothers in administration in the U.K.
7 sold that special asset?

8 A Yes, it did.

9 Q Do you recall the purchase price?

10 A I believe it was one Euro.

11 MR. MILLER: Excuse me, Your Honor.

12 THE COURT: Yes, Mr. Miller?

13 MR. MILLER: I'm sorry. I object. I don't
14 understand why this is relevant to anything.

15 THE COURT: I mean, I can imagine where this is
16 going, but I'm having a hard time seeing the relevance.

17 BY MR. SCHAGER:

18 Q Mr. Gran, I think your comments have been very helpful,
19 and I'll just ask one question in finishing off, and that is
20 to restate if you had left Lehman to go work for a Barclays
21 in January of 2008, it would have meant giving up your
22 contingent stock award claim of 1.2 million; is that
23 correct?

24 A That's correct.

25 MR. SCHAGER: Your Honor, I have no further

1 questions for Mr. Gran.

2 THE COURT: All right.

3 Mr. Gran, stay on the line, please.

4 Mr. Miller, do you have cross-examination?

5 MR. MILLER: Very briefly, Your Honor. I want to
6 make sure Mr. Gran can hear me.

7 Mr. Gran, can you hear me when I speak into this
8 microphone?

9 THE WITNESS: Yes, you're a little bit faint, but
10 I can hear you.

11 THE COURT: Okay. Mr. Miller, you can do this
12 sitting down, if it's more comfortable, if that mike will
13 get over your notebook there. Yeah, there you go.

14 MR. MILLER: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. MILLER:

17 Q Mr. Gran, my name's Ralph Miller. I represent Lehman
18 Brothers Holdings, Inc. You and I have never met or spoken
19 before; is that correct?

20 A That's correct.

21 Q Mr. Gran, I understand you said that you worked at a
22 Lehman entity for a period of time and left. Did I
23 understand that correctly?

24 A You did.

25 Q And, before you left, you were the recipient of some

1 contingent stock awards, some CSAs, correct?

2 A Yes.

3 Q And you chose to come back to Lehman after a period of
4 time and start employment again, correct?

5 A I did.

6 Q And you knew when you came back that you would again
7 receive compensation that would be partially in CSAs; was
8 that correct?

9 A Well, as a standard, the offer letters would say that
10 you're eligible to participate if the company decided it.

11 Q Well, but you understood that the compensation system
12 at that time included some portion of your compensation in
13 CSAs rather than all cash; is that correct?

14 A Absolutely.

15 Q And you still chose to come back at that time after
16 understanding how the CSA system worked, correct?

17 A Yes, in fact, all banks have similar ideas (sic) how
18 the plan was, but --

19 Q When you say all banks, what do you mean by that,
20 Mr. Gran?

21 A What I mean is any organization you would join would
22 have a compensation plan which would incorporate some kind
23 of deferred compensation which would somehow be tried to tie
24 into a level of the price.

25 Q And, in the interim that you were not working with

1 Lehman, did you go to work for another bank, as you put it?

2 A No, I did not.

3 Q So, when you worked at the other firm -- and without
4 going into much detail -- did it have a deferred
5 compensation system?

6 A No, they did not.

7 Q So you voluntarily chose to go from an organization
8 that did not have a deferred compensation system back into
9 Lehman and the industry that had deferred compensation; is
10 that right?

11 A No, it took some effort to get some detail on this
12 (sic), because the fact that I left to set up my own hedge
13 fund, which I did do, and I ran it for several years, and
14 Lehman Brothers asked me to come back to set up proprietary
15 (sic) asset management because when I had left Lehman
16 Brothers, they didn't have asset management. So they
17 couldn't run (sic) the kind of fund that I was running
18 within the organization, but, once they could, they asked me
19 to come back, and that's why I was back. I didn't go back
20 (indiscernible - 2:38:48) to whether or not the sort of
21 compensation schemes, CSAs or not. It had no relevance. It
22 was only about furthering my career.

23 Q All right. Well, you made a voluntary decision that
24 you would rather go to work for Lehman, including the
25 deferred compensation system, than continue with your own

1 hedge fund; is that correct?

2 A Sure, because no one ever had any reason to believe
3 that they wouldn't receive the deferred compensation in
4 these types of arrangements.

5 Q Well, Mr. Gran, --

6 A An outstanding (sic) organization would have believed
7 that they would not receive the compensation.

8 Q Mr. Gran, did you -- excuse me. I don't want to
9 interrupt you. Are you finished?

10 A No. What I wanted to say is that the way this would
11 work is that an organization would give you an award, and
12 that award is what would actually be a tradeable value for
13 that compensation. What happened to the stock that you
14 might be given in the future when you convert (indiscernible
15 - 2:40:03) on the tradeable value in general when you moved
16 around from bank to bank. Or, if you left with a friendly
17 lever (sic).

18 It was all negotiable based on cash values, and
19 Lehman wasn't treated successfully (sic) until the time when
20 you actually need the stock, and, having been someone who
21 received the stock at one point and then later did not, I
22 understand also the way the other organizations treated this
23 value, many people were moving from bank to bank. I can
24 tell you it was not treated as equity at any point in time.
25 It was treated as deferred compensation, which somebody

1 would be losing. Or even in an organization like Lehman
2 Brothers, if the stock cost went down after giving an award
3 like that, in most cases, they would try to make adjustments
4 for compensation. In the year that happened, they already
5 make up for that. Because when you (sic) do that, everyone
6 thought of it as deferred compensation. Not bad, making
7 that mistake (sic).

8 MR. MILLER: Your Honor, I do object to the
9 answer. It's non-responsive, but --

10 THE COURT: Well, we were struggling with a number
11 of things here. One is the -- in order to accommodate the
12 witness, we're doing this telephonically, but it does kind
13 of create a non-standard dynamic in terms of the ability to
14 limit the witness' answering the question. So Mr. Gran is
15 getting a lot more leeway than he would be if he were
16 sitting in the courtroom and Mr. Miller would be asking
17 simply yes or no questions.

18 So, Mr. Miller, if you want me to start enforcing
19 the rules of cross-examination, I'm happy to do that.

20 MR. MILLER: Well, Your Honor, I simply wanted to
21 note that at this point.

22 BY MR. MILLER:

23 Q Mr. Gran, you were asked to do a computation earlier on
24 how much you received in CSAs. Do you recall that? As a
25 percent of your total compensation?

1 A Yes, I was asked specifically for a particular document
2 to do a calculation.

3 Q Right. Going back to page three of four in the claims
4 form that was marked CLX89 -- do you remember that document
5 you looked at?

6 A Yes, I do.

7 Q If I'm reading that correctly, you received a total
8 compensation in pounds of 377,325 pounds, as shown in this
9 page; is that right?

10 A I was not able to hear you any more.

11 Q I'm sorry. It looks like you received 377,325 total
12 compensation, shown on this page in pounds; is that right?

13 A That's right.

14 Q And, of that, 65,089 pounds was equity award, correct?

15 A Yeah, the deferred part (sic) is 65,000 originally
16 (sic).

17 Q Now, when I did that math, that looked like that was
18 about 17-and-a-quarter percent of your compensation that
19 year was in a value expressed as equity awards, right?

20 A Only from the standpoint of this page, this computation
21 (sic) second page.

22 Q Right, but for this example, that's the way it worked
23 out?

24 A That's the way it worked for this example.

25 Q And I believe you indicated that the portion that was

1 paid in CSAs was always a portion of the bonus and never a
2 portion of the base salary; is that correct?

3 A Yeah, I think it was just the way they calculate (sic)
4 the percentage really (sic). Percentage of the bonus --
5 that the bonus didn't actually -- because I remember not
6 just the bonus, but also total compensation because, if I
7 remember the way the numbers worked, the organization used a
8 formula based on what level (sic) of the organization you
9 were and what the size of the compensation was, and there
10 were bands (sic) of compensation into the percentage, I
11 think, based on total compensation, not based on bonus.

12 Q All right. Well, just to briefly explain that to the
13 Court, there was something called the grid. Do you recall
14 what that was with regard to the percentages?

15 A Yes, from time to time, a grid was tried (sic).

16 Q Can you explain to the Court what the grid was?

17 A I think, you know, the grid was just the -- and it
18 changed over time -- was, in fact, we'd been getting, you
19 know, what I can describe to you as well, this is why you
20 got this percentage as a CSA, and this is how much your
21 bonus is because of these calculations. It was only a way
22 of showing the table and showing how the calculation was
23 done, and it might have been the sum of that, or I don't
24 remember the compensation reviews, and I don't remember if I
25 actually received it or not, but it would be something that

1 was, in fact, and traded for the OTO (ph).

2 Q All right.

3 MR. MILLER: I have no further questions,
4 Your Honor, on cross-examination.

5 THE COURT: All right.

6 Mr. Gran, can I ask you a question? It's the
7 judge.

8 THE WITNESS: Sure.

9 THE COURT: On the page three of four of this
10 document that I'm looking at -- can you hear me, sir?

11 THE WITNESS: I can.

12 THE COURT: Okay. There's a line in the middle.
13 There's a total compensation summary, and then, it says
14 total compensation \$750,000. I'll stick with U.S. dollars.
15 And then, in the text below, it says that -- under
16 additional information, it says the notional value of your
17 2007 compensation, including the grant date value of the
18 discount portion of the CSAs awarded under the equity award
19 program is U.S. \$793,125. So there is a delta there of
20 approximately \$43,000. Is that attributable to the gross-up
21 that you get on account of acquiring the CSAs at a discount?
22 I'm just trying --

23 THE WITNESS: That's the current (sic) based on
24 the discounts of the CSAs.

25 THE COURT: Okay. So --

1 THE WITNESS: They were trying to mark the rights
2 to have the shares. If you were to have the shares then,
3 then they would be worth that at that time.

4 THE COURT: At that time? So the difference, the
5 discrepancy between when it says total compensation,
6 750,000, and the notional total value has to do with the
7 inclusion or not of the discounted shares?

8 THE WITNESS: That's correct.

9 THE COURT: Okay. Thank you.

10 All right. I think, Mr. Gran, we can bid you good
11 evening.

12 REDIRECT EXAMINATION

13 BY MR. SCHAGER:

14 Q One final question, if I may, Mr. Gran? And that is
15 this. Are you familiar with something called a restricted
16 stock unit trust or an RSU trust? Mr. Gran?

17 A Not specifically, but I believe that there was an stock
18 unit trust, but I don't remember -- I don't have any
19 specific information about it.

20 Q Okay. Thank you. I think we've concluded, Mr. Gran.
21 Sorry to keep you up so late.

22 THE COURT: Thank you again.

23 THE WITNESS: Thank you.

24 THE COURT: All right. What's next?

25 MR. SCHAGER: Okay. Your Honor, I would like to

1 call Sandy Fleishman Richmond to the stand, please.

2 THE COURT: All right.

3 Come on up here, please. Yes. Would you raise
4 your right hand?

5 (Witness Sworn)

6 THE COURT: Very good. Ma'am, I'm afraid that
7 you're not allowed to have any documents with you when
8 you're testifying as a witness.

9 DIRECT EXAMINATION

10 BY MR. SCHAGER:

11 Q Could you state your name again for the record, please?

12 A Sandy Fleishman Richmond.

13 Q Okay. Ms. Fleishman, when did you start work at Lehman
14 Brothers?

15 A I started working at Lehman Brothers in 1993.

16 Q And, at the time of the bankruptcy, were you still
17 employed with Lehman Brothers?

18 A Yes, sir.

19 Q And can you describe for the Court your position,
20 please?

21 A At that point, I had become a managing director. I was
22 a part of the prime brokerage division, and I was
23 responsible for a sales organization within that division.

24 Q Okay. When did your employment at Lehman Brothers end?

25 A I was employed at Lehman Brothers right through the

1 bankruptcy, and then, I was part of the team that was
2 acquired by Barclays after they came in and purchased the
3 bankrupt entity.

4 Q Could you describe what your responsibilities are for
5 Barclays now?

6 A I continue to be a managing director at Barclays in the
7 prime brokerage division. I am part of an origination sales
8 force covering a variety of investment managers and hedge
9 funds for various services.

10 Q Thank you.

11 MR. SCHAGER: Your Honor, I would like to show
12 Ms. Fleishman copies of two documents.

13 THE COURT: Okay.

14 MR. SCHAGER: They are both marked. One is CLX59,
15 which is her declaration, and the second is a document
16 marked CLX60, which is the exhibit to the declaration.

17 THE COURT: Okay.

18 MR. SCHAGER: I can approach the Court, if I may
19 approach the Court, I can give copies of them.

20 THE COURT: I have them here.

21 MR. SCHAGER: Good.

22 THE COURT: So we're at CLX59 and then CLX60,
23 which looks like it's the proof of claim.

24 Thank you.

25 BY MR. SCHAGER:

1 Q Ms. Fleishman, can you look quickly at the last page of
2 CLX59, and that is your signature?

3 A Yes, sir.

4 Q And can I ask you to look at page -- sorry. CLX60 --
5 this is your proof of claim; is that correct?

6 A Yes, sir.

7 Q Okay. Can I refer you to page 10, and, when I say page
8 10, I'm looking at the numbering at the top, page 10 of 11.
9 It's a document with your name entitled equity awards
10 outstanding as of September 12th, 2008.

11 A Yes.

12 Q Was this part of your proof of claim when you filed it?

13 A Yes, sir.

14 Q Where did you obtain it?

15 A I received it from the H.R. department at Lehman
16 Brothers.

17 Q Okay. Was that by your special request, or was that
18 generally available to employees?

19 A I had requested it.

20 Q Okay. Thank you. Going back to page nine,
21 Ms. Fleishman, your proof of claim -- this is Exhibit 1 to
22 your declaration. Can I ask you whether that is your
23 handwriting on the form?

24 A I'm sorry. Just to be clear, we're talking about this
25 page?

1 Q That's correct, yes.

2 A Anything handwritten is my handwriting.

3 Q Okay. Now, in the upper left, there is the name of the
4 proceeding typed in. Lehman Brothers Holdings -- sorry.

5 Name of debtor -- it says Lehman Brothers Holdings, Inc.

6 Above that just under the name of the Court is Lehman

7 Brothers Holdings claims processing center in care of Epiq

8 Bankruptcy Solutions. Did you add that to the form?

9 A No, sir.

10 Q That was there when you got the form?

11 A Yes.

12 Q Okay. Going over to the right-hand side,

13 Ms. Fleishman, under notice of scheduled claim, there is

14 some typed language there called Schedule G, executory

15 contract or unexpired lease and then description restricted

16 stock unit agreement. Did you type that in the form?

17 A No, sir.

18 Q That was on the form when you received it?

19 A Yes, it was.

20 Q Okay. And where did you receive the form?

21 A Well, this was all part of the filing of the initial
22 claim.

23 Q Okay. That's how you filed it the claim, but, if you
24 did not fill out the form, then where did you receive the
25 form?

1 A It was delivered to me from various Lehman groups that
2 -- I mean, as you can imagine at the time, we were all
3 scrambling to try to get an understanding of the process,
4 and it was delivered to me through Lehman Brothers.

5 Q Sorry. The form was delivered to you through -- from
6 Lehman Brothers?

7 A Yes.

8 Q Okay. So now, take a look at the last page of the
9 proof of claim, please. That's the envelope address.

10 A Yes.

11 Q Is that your handwriting on the envelope?

12 A Yes, it is.

13 Q Okay. And you got that address from the address on
14 page one of the form?

15 A Yes.

16 Q So Lehman Brothers provided the form to you, told you
17 your claim was a Schedule G executory contract claim for
18 restrictive stock units and told you where to file?

19 A Yes.

20 Q I'm going to ask you to review, Ms. Fleishman, a
21 document that has been entered in the record. It's a form
22 called a total compensation statement. It's been marked as
23 CLX32.

24 MR. SCHAGER: May I approach the witness,
25 Your Honor.

1 THE COURT: Sure.

2 MR. SCHAGER: All right, and the Court has the
3 form (sic)?

4 THE COURT: I'm not sure which one.

5 MR. SCHAGER: I would be happy to hand one up, if
6 you'd like (indiscernible - 2:55:22).

7 THE COURT: I'm having a hard time with these
8 unwieldy binders today. CLX32?

9 MR. SCHAGER: Right.

10 THE COURT: Okay.

11 BY MR. SCHAGER:

12 Q Ms. Fleishman, I offer this form because it's something
13 that the parties have agreed to. Does the form look
14 familiar to you?

15 A Yes.

16 Q Have you seen forms like this before?

17 A It's similar to what we would receive every year at the
18 end of the year for compensation notification.

19 Q Okay. So you received letters -- sorry -- total
20 compensation statements in this form?

21 A Yes.

22 Q Okay.

23 A Very much like this.

24 Q Now, this form is dated at the lower right December 5,
25 2012.

1 A December 12th, 2005, I would imagine, but --

2 Q I'm sorry. I stand corrected. Thank you. Do you see
3 any significance in that date?

4 A Well, the fiscal year end of Lehman Brothers was
5 November 30th at the time, I believe, and so, you would be
6 notified of your total compensation some time before the end
7 of December.

8 Q Thank you. On this form, CLX32, the employee is
9 described as having total compensation of \$1,100,000 with
10 the salary portion being about \$200,000. That figures out
11 to about 18 percent. Of your total compensation,
12 Ms. Fleishman, could you give the Court an average of what
13 your total salary was as a portion of your total
14 compensation?

15 A Sure, well, it varied over time. The salary was fixed
16 for, I think, most of us at \$200,000. And so, depending on
17 your total compensation, it would vary between anywhere from
18 11 percent to 20 percent, depending on the year.

19 THE COURT: The year that \$200,000 -- was at all
20 times during the period you're describing paid to you in
21 cash on a --

22 THE WITNESS: Yes, salary was always paid in --

23 THE COURT: Salary was always --

24 THE WITNESS: -- cash biweekly.

25 BY MR. SCHAGER:

1 Q Now, on this CLX32, Ms. Fleishman, there is a total.
2 There's a figure given for a bonus of \$900,000, and then,
3 there's a line underneath that showing a reduction that says
4 less RSUs of \$235,000. In the years 2003 to 2008, can you
5 advise the Court roughly what portion of your bonus was
6 shown as RSUs on this form?

7 A Yes, it's somewhere -- again, it varied every year, to
8 be honest, based on your total compensation, and also you
9 referenced the grid. So, over time, the percentages would
10 change.

11 THE COURT: Right.

12 A Not just by how much you earned, but by what the firm
13 determined, and so, on average, you know, somewhere between
14 20 and 40 percent probably was deferred.

15 Q Sorry, 20 to 40 percent?

16 A Yes.

17 Q Thank you. I'd like you --

18 THE COURT: And then, the remainder, the 80 to 60
19 percent, was paid in cash, as it indicates here, on or
20 before January 31 after the first of the year?

21 THE WITNESS: Correct.

22 THE COURT: So you would have either had to -- I'm
23 just thinking about how it would work in terms of taxes. So
24 then, you would have been paying estimated -- how would you
25 have been dealing with that tax issue as you moved through

1 the prior year in anticipation --

2 THE WITNESS: Sure.

3 THE COURT: -- of getting a big sum of cash in
4 January?

5 THE WITNESS: So it was a five-year cliff. So,
6 after you lasted -- after you made it through the five
7 years, you were just paying ordinary income tax on your
8 salary, your cash bonus, and then, the five-year deferral.

9 THE COURT: No, that's not -- I understand that.
10 That's not the question I'm asking you. Putting aside the
11 RSUs, this is just a compensation structure that's back-end
12 loaded, right?

13 THE WITNESS: Yes.

14 THE COURT: So that you get to January 31st, 2006,
15 and this individual, whoever this is, has been paid over the
16 course of 2005 \$200,000 on a monthly basis --

17 THE WITNESS: Yes.

18 THE COURT: -- biweekly basis? And then, you're
19 going to get a check for \$665,000?

20 THE WITNESS: Yes, yes.

21 THE COURT: What do you about the taxes?

22 THE WITNESS: You're paying ordinary tax --
23 ordinary income taxes on that. And, remember, there was
24 always -- once you got over the five-year hurdle --

25 THE COURT: Yes.

1 THE WITNESS: -- you were always getting five
2 years ago as your -- as part of ordinary income.

3 THE COURT: Okay. I -- I'm --

4 THE WITNESS: I'm sorry. Did I --

5 THE COURT: It's getting late. I'm going --

6 THE WITNESS: -- misunderstand?

7 THE COURT: -- to try it one more time.

8 For 2005, this individual --

9 THE WITNESS: Yes.

10 THE COURT: -- okay, is being informed in
11 December, you're going to be paid for the year total
12 compensation of a million-one.

13 THE WITNESS: Yes.

14 THE COURT: So as you've moved through the year
15 you're getting a paycheck and there's deductions and
16 withholding being --

17 THE WITNESS: Yes.

18 THE COURT: -- taken out of it.

19 THE WITNESS: Yes.

20 THE COURT: But you're going to have to file a tax
21 return for tax year 2005, right?

22 THE WITNESS: Yes.

23 THE COURT: And you're not getting -- as you move
24 through the year you're not getting the 665 --

25 THE WITNESS: Yes.

1 THE COURT: -- right? So when I was a partner in
2 a law firm I knew that in April I was getting a distribution
3 of cash. So as I went through 2000 -- I went through the
4 year I was paying estimated payments because I knew that I
5 would be behind from the IRS's perspective --

6 THE WITNESS: Right.

7 THE COURT: -- if I didn't pay that.

8 THE WITNESS: Yeah.

9 THE COURT: So is that what -- I'm trying to
10 understand how you handled the tax--

11 THE WITNESS: So the -- so what you have happen
12 here is you -- let's just pretend this was the first time
13 this person ever worked for Lehman Brothers.

14 THE COURT: Sure.

15 THE WITNESS: 2005, they worked from January 1st.
16 They paid taxes on \$200,000. 2006, they're going to
17 continue to have their \$200,000 salary, but when they
18 receive that check for 665, they're paying ordinary income
19 tax --

20 THE COURT: But my question is --

21 THE WITNESS: -- at that time.

22 THE COURT: -- for which tax year? That's --

23 THE WITNESS: That would be 2006 because it --
24 even though it was earned in 2005, you didn't receive it --

25 THE COURT: It's not a group participation event,

1 folks. Okay. I have a witness on the stand and I'm trying
2 to elicit information.

3 The reason that I am confused is that this is a
4 statement that says, 2005 total compensation.

5 THE WITNESS: Yes, ma'am.

6 THE COURT: Okay. So that that -- it would appear
7 to be not accurate. If you -- the amount that's payable in
8 2006 you're telling me now would be a taxable income for
9 this person in the year 2006. That's not what this
10 statement reflects.

11 THE WITNESS: So, Your Honor, if I may.

12 THE COURT: Sure.

13 THE WITNESS: The way that the process worked was
14 that was fairly standard that you didn't actually receive
15 the payment of your bonus until the next fiscal year.

16 THE COURT: I'm not questioning that. I'm just
17 trying to understand what your tax life looked like. And
18 this statement says that it is a summary of 2005
19 compensation --

20 THE WITNESS: Correct.

21 THE COURT: -- that you happen -- Lehman enjoyed
22 the float.

23 THE WITNESS: Yes.

24 THE COURT: They didn't give it to you until 2006.
25 But when you filed your income -- when this person files

1 their income tax for the year, there's been testimony -- and
2 I think no dispute -- that you don't include an income, the
3 CSUs. The only question that I'm trying to ask is whether
4 or not this person would include in income for 2005 the
5 amount payable in 2006.

6 THE WITNESS: No.

7 THE COURT: No?

8 THE WITNESS: They would not.

9 THE COURT: Okay.

10 BY MR. SCHAGER:

11 Q So you paid -- as cash was received on those referred
12 to as a cash basis?

13 A Yes. She would pay the taxes on the income in the year
14 that you received the income, not necessarily the year you
15 earned it.

16 THE COURT: Okay. That --

17 THE WITNESS: Okay.

18 THE COURT: It's just the statement doesn't read
19 this way.

20 THE WITNESS: Yes. I understand.

21 THE COURT: Do you understand?

22 THE WITNESS: I understand where you could be very
23 confused about a lot of these things, myself included. So
24 --

25 THE COURT: All right.

1 THE WITNESS: -- excuse me for --

2 THE COURT: Okay. Thank you.

3 THE WITNESS: -- being --

4 BY MR. SCHAGER:

5 Q Going back to that statement, Ms. Fleishman, the line
6 item that says, less RSUs, did you pay tax on the RSUs
7 either in 2005 or in 2006?

8 A No, you did not.

9 Q So you had a bonus declared in 2005. You said between
10 25 and 40 percent of it was withheld in designated RSUs and
11 you paid no tax in either 2005 or 2006 on what was
12 designated as RSUs; is that correct?

13 A Yes, sir.

14 Q Okay. Did you ever pay tax on the RSUs?

15 A You would pay tax on the RSUs five years later when
16 they were converted into stock and you could sell your
17 stock. And so you would pay your ordinary income tax at
18 that point on that amount.

19 Q Okay. Ms. Fleishman, I would like to refer you back to
20 your proof of claim, the page marked at the top page 10 of
21 11. You said you got this from human resources. Did you
22 make a -- any special request for format when you put that
23 request to human resources for this form?

24 A No. I was just happy to receive it.

25 Q Okay. And just for the Court's benefit, Ms. Fleishman,

1 there's a column called, fair market value on the granting.
2 That refers to the price of the Lehman shares on the
3 granting; is that correct?

4 A Yes, sir.

5 Q Okay. And then the line time for -- sorry -- the
6 column for grant value, can you explain for the Court what
7 the line for grant -- the column for grant value means?

8 A Yes. It would be the price of the stock on the grant
9 date times the number of RSUs granted.

10 Q Okay. And I noticed that the column that reads, total,
11 the numbers there are exactly the same as the grant value.

12 A Yes.

13 Q Okay. And the only total on that page was the dollar
14 value of the grant; is that correct?

15 A Yes, sir.

16 Q Because they don't bother totaling up the number of
17 RSUs granted.

18 A Correct.

19 Q Was that because the dollar figure was more material to
20 you?

21 A Yes. That was -- when you looked at your total
22 compensation, what you were looking at was your
23 compensation.

24 Q Okay. And I see you also received a grant of stock
25 options in 2003.

1 A Yes, sir.

2 Q I think -- I would just note that for the record. I
3 think we'll come back to that later.

4 I would like to discuss with you generally, Ms.
5 Fleishman, the RSU program. You started work at Lehman in
6 1993, correct?

7 A Yes.

8 Q Did Lehman have an RSU program when you went to work
9 there?

10 A I do not believe so. I don't remember.

11 Q Do you recall when the program was started?

12 A It was when the IPU -- when the spinout from American
13 Express happened, which was shortly thereafter that. I'm
14 not exactly sure what the -- what year it was, but it was
15 fairly soon after that.

16 Q But you're quite certain it was after you went to work
17 at --

18 A Yes.

19 Q -- Lehman. Okay. When did you first participate in
20 the program?

21 A I am not certain of the answer to that. Shortly after
22 it would have been initiated I would have participated in it
23 because almost every employee did participate in the
24 deferred compensation. So as soon as it was initiated I
25 would have participated at some level.

1 Q Were you offered an option to participate?

2 A No, sir.

3 Q Did you elect to participate in the program or did you
4 ask to participate in the program?

5 A No.

6 Q Okay. Were you given any choice about participating in
7 the program?

8 A No.

9 Q Were you allowed to make an election about what portion
10 of your bonus would be withheld for the RSU program?

11 A No.

12 Q Did you sign any forms to join the program?

13 A I don't believe so.

14 Q Okay. Were you able to negotiate the so-called hold
15 period or the cliff as I think you referred to it?

16 A No.

17 Q The period of time for -- during which the RSUs would
18 be withheld. Did you -- were you able to negotiate that
19 five-year period?

20 A No, sir.

21 Q Were you able to accelerate the conversion of the RSUs
22 in any way?

23 A No.

24 Q Could you sell the RSUs?

25 A No.

1 Q Could you -- did you ever try going to a bank to borrow
2 against them?

3 A No.

4 Q Okay. So you -- your bonus is declared and 20 to 40
5 percent of it is withheld. You can't sell them. You can't
6 borrow against them. You don't pay tax on them. They just
7 sit there in an account?

8 A It's --

9 MR. MILLER: Objection, Your Honor. I'm sorry.
10 I've been really trying hard not to --

11 THE COURT: You have been trying hard

12 MR. MILLER: -- object to him leading the
13 witness.

14 THE COURT: -- Mr. Miller. I think you're doing
15 quite well, but there's a limit to the number of leading
16 questions you can ask a witness.

17 MR. SCHAGER: Okay. Thank you, Your Honor. I
18 apologize.

19 BY MR. SCHAGER:

20 Q Let's walk through, Ms. Fleishman, what happens when
21 the RSUs were converted. Did you receive grants of -- you
22 did receive grants of RSUs before 2003?

23 A Yes.

24 Q So you did realize income from the RSUs, correct?

25 A Yes, sir.

1 Q Okay. Did you pay a federal tax on the income from the
2 RSUs when they were converted?

3 A Yes.

4 Q Can you describe for the Court how that -- how you
5 learned about the amount of the tax and how it was paid?

6 A It would be ordinary income tax on the conversion
7 amount.

8 Q Okay. I don't have a number, Ms. Fleishman, but let's
9 just use your example from your proof of claim. You
10 received a grant of RSUs with a grant value of \$355,000 in
11 2003. The -- those -- did those -- you did not receive the
12 underlying stock. Those were not converted; is that
13 correct?

14 A That's correct.

15 Q Okay. Now if they had been converted, do you have some
16 -- could you tell me how you would have determined what tax
17 to pay that year?

18 A Well, what would happen is Lehman Brothers would offer
19 you the opportunity to either write a check for the taxes
20 that you would owe or they would tell you that they would
21 sell enough shares to cover your tax obligation. So that
22 was the -- you would elect which way you wanted to handle
23 it.

24 Q And what was your personal election there?

25 A I would take the net shares. So after the -- so after

1 taxes.

2 Q Okay. Was the share price higher in 2007 for your --
3 than it was in 2002 --

4 A Yes.

5 Q -- when your RSUs was granted?

6 A Yes. I'm sure it was.

7 Q Okay. Now did you pay any capital gain tax on any of
8 that?

9 A No.

10 Q All the tax was calculated as ordinary income?

11 A Yes, sir.

12 THE COURT: Okay. I'm -- you've now lost me
13 because we're now talking about RSUs that never converted.

14 MR. SCHAGER: I'm sorry, Your Honor. I reverted
15 back. I apologize. I reverted back to her -- I was using
16 that for an illustration, but since she got RSUs in 2002 and
17 they were converted --

18 THE COURT: Okay.

19 MR. SCHAGER: -- I was going back to that
20 situation.

21 THE COURT: Okay. All right. But I think we've
22 established fairly clearly through a number of witnesses
23 that at the date of conversion the shares are valued at the
24 stock -- then prevailing stock price and that then the
25 recipient paid ordinary income tax on that amount. Have --

1 I don't think that's controverted, so I think we can move
2 along.

3 MR. SCHAGER: Okay, Your Honor. Thank you.

4 BY MR. SCHAGER:

5 Q And the conclusion was that it was taxed like salary,
6 correct?

7 A Yes.

8 Q Okay.

9 MR. SCHAGER: Now my next question, Your Honor,
10 really deals with the situation that we haven't discussed
11 before, but it is discussed in the briefs.

12 BY MR. SCHAGER:

13 Q Ms. Fleishman, did anyone ever tell you -- talk to you
14 about paying tax on the value of the RSUs at the time of the
15 grant so that you could pay capital gain tax on the gain
16 during the five -- that incurred during the five-year
17 holding period?

18 A My understanding is that was not available. You didn't
19 have that choice.

20 Q Okay. Are you familiar with the term of Section 83(b)
21 election?

22 A Not really. No.

23 Q Okay. But you were told that that was not a -- it was
24 not a choice to pay the tax in advance --

25 A Correct.

1 Q -- at the time of the grant I should say.

2 A I believe the structure was that you did -- you paid
3 taxes the five years afterwards. You weren't given the
4 choice of whether you wanted to pay taxes up front or after
5 five years.

6 Q Okay. I would like to talk with you a moment, Ms.
7 Fleishman, about your stock options. We looked earlier at
8 your form and you did receive grants of stock options in
9 2003. Did you receive grants of stock options before 2003?

10 A I do not believe so. I think that might have been the
11 only time -- I think it was the only time I was ever granted
12 options.

13 Q Okay. Do you recall whether you elected to receive
14 stock options in 2003?

15 A No. That -- stock options were a part of the
16 compensation package for that year. So I think the -- I
17 believe the way it worked at that time was in addition to
18 receiving RSUs, you were also receiving stock options as
19 part of your deferred --

20 Q Did you have an understanding of how the stock options
21 would be taxed as compensation to you?

22 A I believe it's just taxed as ordinary income. I'm
23 sorry. When you convert the options -- so you had the right
24 to buy the shares at a price over a period of time. When
25 you converted --

1 Q I'm sorry. That -- what you just said is -- now you're
2 defining a stock option, the right to purchase over a period
3 of time --

4 A Correct.

5 Q -- correct?

6 A Correct. So -- and at a particular price, and you
7 would pay a premium to have that right to purchase over
8 time. Once you converted those shares, you would rationally
9 only do that if you were going to either want to hold the
10 shares or sell them -- in my case it was to sell them -- and
11 then you would pay capital gains on the profit.

12 Q Okay. Thank you.

13 Ms. Fleishman, I wanted to ask you a question
14 about the instrument that we've been calling the RSU trust
15 or the restricted stock unit trust. Are you familiar with
16 that at all?

17 A I was not familiar with that. No.

18 Q Do you recall yourself ever having the opportunity to
19 vote your RSUs?

20 A I do not.

21 Q I would like you to refer back, Ms. Fleishman, to once
22 again your proof of claim, that page you got from human
23 resources showing the grant value of your stock options.

24 And 2006 was a good year for you, correct?

25 A Yes.

1 Q Okay. Why was it a good year?

2 A Well, we had had record profits, I believe, and the
3 entire firm had been making a significant amount of money.
4 So it was a record year from a compensation perspective for
5 me --

6 Q Okay.

7 A -- personally.

8 Q And from your personal perspective, was business good
9 for you that year?

10 A Yes.

11 Q Is the nature of your work client-oriented?

12 A Yes.

13 Q Okay. So you have a group of clients you work with
14 regularly?

15 A Yes.

16 THE COURT: So for the year 2006, what was your --
17 if you recall what was your total cash compensation
18 including the portion that, as you've now described it to
19 me, would have been payable in January 2007. Do you recall?

20 THE WITNESS: So 2006 total cash comp -- I believe
21 the total compensation would have been that year 1.8 million
22 with 200 being the salary, so that brings it down to 1.6.
23 And if you've got the million of deferred, right --

24 THE COURT: So then it would have looked something
25 like this compensation statement with 600 coming in in the

1 January of the following year?

2 THE WITNESS: Yes.

3 THE COURT: Okay. Thank you.

4 BY MR. SCHAGER:

5 Q After January 2006 and after the -- sorry. After
6 January of 2007 and after that 2006 bonus had been paid,
7 could you have marketed your skills and your business
8 contacts to another firm?

9 A Yes. I believe I could. One issue that I've heard
10 discussed today was this idea of the handcuff; that you were
11 handcuffed to the firm. And I think what's important to
12 understand is how restrictive that handcuff was --

13 THE COURT: Hold on one second.

14 THE WITNESS: Sorry.

15 THE COURT: Mr. Miller is on his feet.

16 MR. MILLER: Excuse me, Your Honor. I don't
17 believe this is responsive to the question. It sounds like
18 it's going off to be a speech.

19 THE COURT: Well, it's not responsive to the
20 question. So --

21 MR. MILLER: So I object as non-responsive.

22 THE COURT: All right. Keep going, please.

23 BY MR. SCHAGER:

24 Q My question, Ms. Fleishman, was could you have marketed
25 your skills to a Barclays at the time or to a Morgan Stanley

1 or to a Goldman Sachs?

2 A I could have. Yes. I did not.

3 Q Okay. If they had offered you a higher bonus or a
4 higher salary and the offer was attractive to you, what
5 would you balance it against in terms of leaving Lehman?

6 A So you would balance it against what you would be
7 giving up, which was your five years of deferred
8 compensation.

9 Q Okay. So if we're talking about January of 2007, we're
10 talking about just roughly \$3.4 million. That's --

11 A Yes, sir.

12 Q -- what it would have cost you to leave Lehman?

13 A That's the deferred compensation I would have left
14 behind. Yes.

15 Q Okay. Was leaving Lehman really an option?

16 A It was a difficult option because of the restriction of
17 the good leaver policy over time.

18 Q You said the -- that's the second time we've heard that
19 word today, Ms. Fleishman. You called it a good leaver
20 policy?

21 A Yes.

22 Q Leaver, L-E-A-V-E-R, as in one who leaves?

23 A Yes.

24 Q Can you describe for us how the good leaver policy
25 existed and how it evolved over time?

1 A Yes. So if you chose to leave Lehman Brothers and work
2 for a competitor, you would leave your deferred behind. And
3 over time the definition of a competitor included almost
4 everyone. And so the thought of leaving to go to an
5 investment management firm or any other type of firm you
6 essentially would be leaving your deferred behind.

7 THE COURT: So let me ask you a question. When
8 you look at this statement that's dated as of September
9 12th, 2008, which as it turned out was three days before the
10 filing, though had events unfolded differently, for example,
11 and the government had decided to bail Lehman out, it might
12 have been the case that Lehman continued and that as these
13 cliffs arrived, your stock was worth a very small fraction
14 of the numbers on this page, right?

15 THE WITNESS: Yes.

16 THE COURT: And you understood that, right?

17 THE WITNESS: Yes.

18 THE COURT: Okay.

19 MR. SCHAGER: I'm not sure I did, Your Honor.

20 THE COURT: My point is that this number on this
21 -- there's an RSU chart that's in Claimant's Exhibit 60 and
22 it lists the RSU total of Ms. Richmond as of the eve of the
23 bankruptcy filing at \$3.8 million. And my point simply was
24 that had Lehman continued and we were -- as a functioning
25 business and the RSUs continued and time marched on and we

1 got to the cliffs, then these would have been -- they would
2 have converted into stock as the previous ones had done
3 after the five years and it was possible that the value
4 might have been much lower because the stock price could
5 have -- it could have become a penny stock out of
6 bankruptcy.

7 And that -- I asked Ms. Richmond and she responded
8 that she understood that she had a downside risk with
9 respect to the stock price, as I would expect her, frankly,
10 to understand given that she worked for Lehman for 15 years.
11 So --

12 MR. SCHAGER: I think that's absolutely correct,
13 Your Honor.

14 THE COURT: Okay.

15 MR. SCHAGER: Let me follow that up, if I may,
16 with one --

17 THE COURT: Sure.

18 MR. SCHAGER: -- question.

19 BY MR. SCHAGER:

20 Q Ms. Richmond, in the years that you received a
21 conversion of your RSUs into stock, were there ever years in
22 which the market price of the stock at the date of
23 conversion was lower than the market price at the date of
24 the grant?

25 A I believe so. Yes.

1 Q Okay. And --

2 A I should be able to just check the year-end stock
3 price, right, to see.

4 Q Right.

5 A It went up and down.

6 Q Okay.

7 THE COURT: Are we getting to the end? I'm
8 sensing a lot of tiredness in the group here. Do -- are we
9 -- do you have a lot more?

10 MR. SCHAGER: No. I'm concluded with my
11 examination --

12 THE COURT: Okay.

13 MR. SCHAGER: -- of Ms. Richmond, Your Honor --

14 THE COURT: All right.

15 MR. SCHAGER: -- or Ms. Fleishman.

16 THE COURT: Very good. Okay. Mr. Miller.

17 MR. MILLER: Since he's concluding, are you -- are
18 you concluded?

19 MR. SCHAGER: I'm sorry. I'm concluded.

20 CROSS-EXAMINATION

21 BY MR. MILLER:

22 Q I want to make sure I address you correctly. Do you
23 prefer to be called Ms. Fleishman, Ms. Fleishman-Richmond or
24 Ms. Richmond?

25 A It is a little confusing. I apologize. I go by

1 Fleishman at work.

2 Q All right. Ms. Fleishman, you made reference to
3 something you called the grid. Do you recall that in one of
4 your answers?

5 A Yes. I referenced someone else referencing it. Yes.

6 MR. MILLER: May I approach the witness, Your
7 Honor?

8 THE COURT: Yes.

9 BY MR. MILLER:

10 Q I would like to give you a document which was part of a
11 stipulation that was referred to before.

12 MR. MILLER: Your Honor, this is Exhibit 3 to
13 CL00-1, the stipulation. And it is a 2003 equity award
14 program.

15 Q You were at Lehman in 2003; is that correct?

16 A Yes, sir.

17 Q And I believe your declaration makes reference to
18 looking at program documents. You did, from time to time,
19 look at program documents, right?

20 A Yes. Yes, I did.

21 Q Did you traditionally get a set of program documents
22 that was something like a dear colleague letter that was
23 discussed?

24 A Yes, sir.

25 Q That was an annual event?

1 A Yes, it was.

2 Q About when did that usually occur?

3 A I would guess it occurred towards the time of year when
4 you would be receiving your award. I'm not 100 percent
5 sure.

6 Q If you can approximate what time of the calendar year
7 --

8 A I would imagine toward the end of the calendar year.

9 Q All right. Was this equity award program booklet
10 typically one of the things that you got in that delivery of
11 materials?

12 A Something like this. Yes, sir.

13 Q And if you would flip through, and there are numbers
14 here at the top, page something of 148, perhaps if you could
15 flip over to page 37 of 148. Do you see that?

16 A Yes, sir.

17 Q There is a -- what's called a 2003 equity award
18 schedule. Do you see that?

19 A Yes.

20 Q Is that what is commonly called the grid?

21 A Yes, it would be. This is the grid for a senior vice-
22 president.

23 Q And what was your position at that time?

24 A I was a managing director.

25 Q All right. Where is the -- is there a managing

1 director grid in here?

2 A No.

3 Q Not in this example?

4 A I don't believe so, sir. It says, senior vice-
5 president on the front of it.

6 Q All right. So there would be a separate grid for each
7 level of employee; is that --

8 A There might have been.

9 Q All right.

10 THE COURT: Mr. Miller, could you give me a
11 minute, please.

12 MR. MILLER: Sure.

13 THE COURT: For future reference, note to all the
14 young lawyers and paralegals in the room, giant binders, not
15 very useful.

16 (Laughter)

17 THE COURT: Smaller binders, much more useful.

18 MR. MILLER: Yes. If I may approach, Your Honor,
19 I have two free copies of --

20 THE COURT: Sure.

21 MR. MILLER: -- that which will help you in the
22 future.

23 THE COURT: All right. Thank you.

24 MR. MILLER: All right. So, Your Honor, we were
25 looking at in this document the -- this document actually

1 doesn't -- it's -- this --

2 THE COURT: What's the title on the top of the
3 page?

4 MR. MILLER: It's salaried --

5 THE COURT: Salary.

6 MR. MILLER: -- members of the firm.

7 THE COURT: I got it. Thank you.

8 MR. MILLER: All right.

9 BY MR. MILLER:

10 Q And, Ms. Fleishman, as I understand it the -- there's a
11 compensation range shown and then it's possible to read
12 across and there is a portion of the 2003 compensation paid
13 through the equity award program; is that right?

14 A Yes, sir.

15 Q It's (indiscernible)?

16 A Yes, sir.

17 Q So it's not discretion with regard to an individual
18 person. Everybody in this position who made a certain
19 amount of money could look it up and figure out what the
20 percentages were; is that fair?

21 A Yes, sir.

22 Q Was that the consistent practice while you were at
23 Lehman; that there was a grid with this formula?

24 A Yes.

25 Q Do you recall getting RSUs in 1994?

1 A I do not recall getting RSUs in 1994.

2 Q Did you -- when do you first recall getting RSUs?

3 A I -- honestly, I don't know when the RSU program
4 started. I would have started receiving them when it was
5 initiated. What I suggested was it was probably when the
6 firm went public. It might have been '94, '95 when --

7 Q All right.

8 A -- the spinout from American Express occurred.

9 Q You think some time in the 1990s?

10 A Yes, sir.

11 Q Do you recall whether the first set of RSUs that you
12 received matured five years later?

13 A Yes.

14 Q And with that first group, do you recall whether the
15 value of the stock went up over that five-year period from
16 the 90s until later?

17 A I don't know exactly where the yearend price for the
18 stock was each year. It generally went higher. There were
19 some significant dips in the stock price over time. I
20 imagine it's -- I'm sorry. I don't know the yearend stock
21 price for each year.

22 Q All right. You were asked some questions about leaving
23 and the possibility of leaving. Do you remember that
24 general topic?

25 A Yes, sir.

1 Q Were you aware that there was a practice of many
2 investment banking firms to compensate people for the
3 deferred compensation that they would leave if, as a part of
4 negotiations on having them change firms?

5 A I'm -- I believe that did exist. I never engaged in
6 those conversations so I have no firsthand knowledge of that
7 happening.

8 Q Okay. There was a reference to the so-called good
9 leaver policy. Was -- what -- was there a program by which
10 parties could be approved to leave and retain their RSUs in
11 some way?

12 A I'm sorry. Ask that again.

13 Q Yes. I thought there was a reference to the so-called
14 good leaver policy.

15 A Yes, sir.

16 Q What did that policy have to do with as you understood
17 it?

18 A So the good leaver policy was how you could leave the
19 firm and continue to keep your deferred compensation. So --
20 and it -- as I had started to say, it changed over time and
21 it became very restrictive. Initially, anyone other than a
22 major investment banking competitor was considered a firm
23 you could go to. So, in other words, if you went to a
24 client, that would be a good leaver. Over time, all of
25 those designations changed.

1 Q You're now at Barclays?

2 A Yes, sir.

3 Q Does Barclays have a deferred compensation program now?

4 A Yes, it does.

5 Q Okay. And --

6 A May I elaborate or am I not allowed to elaborate?

7 Sorry.

8 THE COURT: Mr. Miller's call.

9 Q Well, I was going to ask you does that deferred
10 compensation program includes some sort of restricted stock
11 unit or stock award?

12 A Yes, it does. It's materially different than the
13 Lehman Brother's five-year cliff. The Barclays program is
14 over a three-year time horizon and it's broken down between
15 cash and stock, a third, a third, a third. And of that
16 third each year, you get that third -- so instead of waiting
17 the full five-years to have access to any of your deferred
18 comp, you get a third each year and that third each year is
19 split 50/50 between cash and stock.

20 Q Now when you say cash and stock, is it actually stock
21 or is it the right to receive some stock?

22 A I'm not sure. I am not certain of the answer to that.

23 Q Okay. You did try to understand the Barclays' deferred
24 compensation program once you got to Barclays; is that
25 right?

1 A Yes.

2 Q And you tried to understand the deferred compensation
3 program while you were at Lehman; is that right?

4 A Yes.

5 Q It was important to you to understand how those things
6 worked?

7 A Yes.

8 MR. MILLER: I have no further questions of this
9 witness, Your Honor.

10 THE COURT: Okay. Any redirect?

11 MR. SCHAGER: Your Honor, one quick question on
12 redirect, I think.

13 REDIRECT EXAMINATION

14 BY MR. SCHAGER:

15 Q Ms. Fleishman, you described -- you said that you
16 thought you had some knowledge about practices among
17 investment banks for employees who might shift from one to
18 another. In your experience what factors would the
19 recruiting investment bank consider when evaluating the RSUs
20 the employee was leaving behind?

21 MR. MILLER: Excuse me. Objection, Your Honor. I
22 think she testified she's never done it and I think this is
23 asking her for what amounts to an expert opinion on custom
24 usage.

25 THE COURT: Well, I mean, I also think it lacks

1 foundation. I don't know if the witness actually knows.

2 MR. SCHAGER: Withdrawn, Your Honor.

3 THE COURT: Okay.

4 MR. SCHAGER: That's fine.

5 THE COURT: All right.

6 Ms. Fleishman, thank you very much.

7 THE WITNESS: Thank you.

8 THE COURT: You can step down.

9 All right. It's -- so we're now approaching the
10 four-hour mark. What is it that you all would like to do
11 next?

12 MR. SCHAGER: Your Honor, may I have two minutes
13 to discuss something with my nemesis.

14 THE COURT: Sure. I think it's clear that we're
15 not going to make it to finish today. And the question is,
16 you know, I'm willing to take responsibility for a portion
17 of the overage, but not all of it. So we're now at four
18 hours -- almost at four hours and I don't think I spoke for
19 more than an hour. So simple math would indicate that the
20 claimant's time has been used.

21 So let's try to figure out what we're going to do.

22 MR. MILLER: Your Honor, we have a request from
23 our part of the table that if he's going to take a two-
24 minute conversation, could we have a five-minute break so
25 some people can have a --

1 THE COURT: Yes. Absolutely. So let's take a
2 five-minute break. I'll do you one better. Take a ten-
3 minute break and figure out what we're going to -- what you
4 would like more to accomplish today, but I need to check
5 with the wonderful person sitting over here because she
6 didn't sign up to be after five o'clock today and I think
7 I'm getting on everyone's patience in this building by
8 staying as late as I do.

9 So my preference would be to roll into tomorrow
10 unless we have witnesses who cannot make themselves
11 available.

12 So let's take a ten-minute break and I'm going to
13 have to also get some coverage over here in the front. All
14 right.

15 Thank you.

16 UNIDENTIFIED SPEAKER: Your Honor --

17 THE COURT: Yes.

18 UNIDENTIFIED SPEAKER: -- so we're on the --

19 THE COURT: Yes, sir.

20 UNIDENTIFIED SPEAKER: I'm willing to make myself
21 available (indiscernible), but without having my Blackberry
22 I can't check what I can and can't do.

23 THE COURT: Okay.

24 UNIDENTIFIED SPEAKER: Ms. Stiefel went down to
25 get --

1 THE COURT: Can you --

2 UNIDENTIFIED SPEAKER: -- hers from the guards.

3 If Mr. Romallo can go down --

4 THE COURT: You can -- whoever needs to get their
5 Blackberry or your smart phone, go downstairs and we'll call
6 down to the CSOs and tell them to let you bring your devices
7 up. All right. So we'll take care of that.

8 And then, Francis, is there anyone around who can
9 take --

10 THE CLERK: I can stay.

11 THE COURT: You can stay a little bit more?

12 (Recess taken at 5:14 p.m.; resume at 5:26 p.m.)

13 THE COURT: All right. What are -- what have we
14 decided to do?

15 MR. KAPLAN: Well, Your Honor, if I might, as to
16 the new (indiscernible) --

17 THE COURT: Yes.

18 MR. KAPLAN: -- witnesses, Ms. Stiefel was here.
19 She had a client meeting at six that she pushed off, so she
20 left.

21 THE COURT: Okay.

22 MR. KAPLAN: She is -- because of pushing things
23 around from today, she can be available tomorrow between one
24 and two. So I propose that we somehow deal with the pro
25 se's in the morning and then she'll be available for cross-

1 examination and so on. Mr. Miller indicated there's some
2 issues with her initial supplemental declaration. We may
3 have to deal with those first. We can deal with those
4 tomorrow or whenever.

5 The -- Mr. Romallo and Mr. Reynolds are both here.
6 They can come back tomorrow or they can testify tonight.
7 But if we don't want to go too much longer, they're
8 available tomorrow.

9 THE COURT: Okay.

10 MR. KAPLAN: I would suggest they come back
11 tomorrow afternoon as well because we have the pro se's in
12 the morning.

13 THE COURT: That would seem to make sense. I
14 mean, the risk that we have is that if we -- because we
15 don't know how many pro se's wish to appear, we could end up
16 with an empty morning. But I don't know -- I just don't
17 know how to manage that.

18 MR. KAPLAN: Yeah. I mean -- yeah. And I don't
19 really want to take these people away from --

20 THE COURT: Oh, I understand.

21 MR. KAPLAN: -- managing money the whole day if --

22 THE COURT: I understand that.

23 MR. KAPLAN: -- if I can avoid it since they've
24 done that this afternoon.

25 THE COURT: Mr. Miller, what would you folks --

1 MR. MILLER: Yes.

2 THE COURT: -- like to do?

3 MR. MILLER: Thank you, Your Honor. Ralph Miller
4 again for the record.

5 Mr. Kaplan made reference to the fact that we do
6 have a little procedural or it's an evidentiary issue.
7 There are declarations for at least one of these witnesses
8 that we have specific objections to, and if we can go over
9 those objections with the Court, perhaps -- one possibility
10 would be in the morning before we begin the pro se's, it's
11 possible that we won't have to call Ms. Stiefel if --

12 THE COURT: Okay. So those --

13 MR. MILLER: -- our objections --

14 THE COURT: -- those hit the docket on March 27th,
15 right, those supplemental declaration of Stephanie Stiefel
16 and Henry Romallo.

17 MR. KAPLAN: Last Thursday after the conference.
18 Yeah. It was the 27th. Yeah.

19 THE COURT: Okay. And you have to refresh my
20 recollection. Did we discuss those in the conference?

21 MR. KAPLAN: We discussed it in the conference
22 that they had been prepared and circulated and that there
23 was some objections to them, and then I conferred with Ms.
24 Alvarez in the afternoon and she said she continued to have
25 the objections, but that I should go ahead and file them.

1 So I did. And then they filed their objections -- they sent
2 me copies of their objections on Friday, which I didn't
3 frankly think too much of. So then they filed formal
4 objections yesterday, and that's where we are.

5 My sense is that what they are objecting to is the
6 sort of statements that are often made in declarations and
7 in affidavits that the Court takes for what they're worth.
8 And I think Your Honor can look at Ms. Stiefel's affidavit
9 and decide what you want -- what you would consider to be
10 appropriate direct testimony from her and what you would
11 consider to be not appropriate and take it for what it's
12 worth. And we needn't waste a whole lot of time and so
13 wouldn't waste time on her direct.

14 But Mr. Miller apparently has another view.

15 MR. MILLER: Your Honor, may I approach?

16 THE COURT: Yes. I have the objection.

17 MR. MILLER: Okay. That's what I was going to
18 provide to the Court, Your Honor.

19 THE COURT: Yeah.

20 MR. MILLER: Well, going back to my -- what we
21 have done there is to excerpt sentences and phrases from the
22 declaration and state our objections to them. Most of them
23 are legal conclusion and -- I mean, this is, essentially, in
24 our view, a brief more than a declaration.

25 And so --

1 THE COURT: Why wasn't this submitted -- because I
2 wasn't involved obviously when the stipulation was born.
3 Why were these submitted as supplemental declarations and
4 not as part of the first group of --

5 MR. KAPLAN: Because initially we had indicated
6 that we were calling Ms. Stiefel as a witness, and in an
7 effort to avoid burdening the record with unnecessary direct
8 testimony we tried to avoid that by doing it in the form of
9 a declaration, which then was --

10 THE COURT: Was that by -- did you agree to that,
11 Mr. Miller?

12 MR. KAPLAN: There was a letter sent to me by Mr.
13 Miller where we had asked him to stipulate to facts that
14 were in our brief and he said, I can't stipulate to facts in
15 your brief. But if you put them in the form of a
16 declaration, then if we choose we can cross-examine. So we
17 put them in the form of a declaration with the person who
18 had -- from a person who had the most knowledge of the facts
19 from our side of the table. And that's why we filed the
20 supplemental declaration in the hope of avoiding unnecessary
21 direct testimony.

22 But, you know, if you want me to put Ms. Stiefel
23 on on direct, I'll do that, too. I mean, you know, I'm
24 trying to keep --

25 THE COURT: I'm trying --

1 MR. KAPLAN: -- things streamlined.

2 THE COURT: I'm trying very hard to not let this
3 kind of devolve into chaos.

4 MR. MILLER: Your Honor, this is outside the
5 procedures order. Mr. Kaplan made a request for us to
6 stipulate to facts. We tried to respond in good faith and
7 say we can't stipulate to these facts and he decided to go
8 with these declarations. We didn't get them until very
9 late. We've been trying to object in timely fashions. He
10 said -- we asked him to consider the objections in hopes he
11 would withdraw parts of it. He decided not to withdraw any
12 of it. So that's why we have a disagreement on the
13 document.

14 But we --

15 THE COURT: Well --

16 MR. MILLER: -- again, we'll --

17 THE COURT: -- I mean, just --

18 MR. MILLER: -- approach it any way the Court
19 wants to.

20 THE COURT: -- just having -- I did look at this
21 when it came in. I mean, if you look at paragraph number
22 10, you know, that is hearsay. I mean, so, you know, if
23 these were supposed to be simple declarations of fact --

24 MR. KAPLAN: Well, the first part is -- it may be
25 hearsay, but you -- we have the Romallo deposition -- the

1 Romallo declaration in evidence --

2 THE COURT: But --

3 MR. KAPLAN: -- and Mr. Romallo --

4 THE COURT: -- she's saying as -- she's saying as
5 -- for -- either it's hearsay or it's a brief. I mean, as
6 demonstrated in the declaration of Henry Romallo. It -- her
7 --

8 MR. KAPLAN: Right. I --

9 THE COURT: -- her view of Henry Romallo and his
10 situation is --

11 MR. KAPLAN: I --

12 THE COURT: -- just --

13 MR. KAPLAN: I mean, you know, if it's that
14 sentence that's the big issue here, I don't have a problem
15 taking it out. But it's clear that she knew, as a managing
16 director and former partner of Neuberghers, she knew what
17 Heidi Steigler's (ph) role was in soliciting these things.
18 She didn't -- she does -- and that's -- the second part is
19 not hearsay. That's based on her personal knowledge of what
20 her role -- of knowing what Ms. Steigler's role was, and she
21 doesn't say what the conversations are. She doesn't relate
22 any hearsay.

23 THE COURT: Well, look, I mean, you know, what for
24 that one -- you know, so take, for example, paragraph 17:
25 "This clearly evidences that the withheld amounts from 2003

1 through 2007 similarly were and are compensation and not any
2 sort of equity investment." So that's clearly the decision
3 that I have to make. That's not -- that's her view.

4 MR. KAPLAN: That's her view.

5 THE COURT: That's her view. But it -- I --

6 MR. KAPLAN: I mean, but that's her view and you
7 take it as her view. That's my attitude towards this. This
8 is a declaration. That's her view, and it's your ultimate
9 conclusion that's going to prevail.

10 THE COURT: Mr. Miller, help me here. I just --
11 we need to figure out a path forward. I mean --

12 MR. MILLER: Yes, Your Honor.

13 I think there's a simple solution to this, I
14 guess, Your Honor, and that is if the Court does not wish to
15 work through the declaration, which is fine with us, then
16 one of the options is to call this witness live and he can
17 elicit direct in lieu of the declaration and we'll object to
18 --

19 THE COURT: Yeah. I mean, I'm never -- in this
20 type of a situation, you know, I'm not a big fan of these
21 declarations because the lawyers write them. The lawyers
22 write them. So --

23 MR. KAPLAN: Absolutely.

24 THE COURT: So it's not fact testimony of the
25 witness. It's a document written by a lawyer that somebody

1 signs. I mean -- so, you know, I mean, I do this every day.
2 I'm really not interested in declarations except as a
3 convenience matter because it completely undercuts, to me,
4 the utility of the testimony because the lawyer is writing
5 the testimony.

6 So, you know, I think we ought to just -- if Ms.
7 Stiefel -- Steeple (sic), is it --

8 MR. KAPLAN: Stiefel.

9 THE COURT: -- is available , then you can put her
10 on the witness stand and, Mr. Miller, you can cross her.

11 MR. KAPLAN: That's fine.

12 MR. MILLER: That's fine with us, Your Honor.

13 THE COURT: All right. And --

14 MR. MILLER: It's (indiscernible) --

15 THE COURT: -- does the same go for Mr. Romallo or
16 did you not have objections?

17 MR. MILLER: No. Mr. Romallo, I think we
18 certainly need his testimony. I mean, it's -- we know here,
19 for example, his supplemental declaration has what is clear
20 hearsay, but I am aware that she (sic) employed similar
21 tactics in, you know --

22 THE COURT: Well --

23 MR. MILLER: I mean, it's got a prayer for relief.
24 So we think that he ought to testify and, you know, have a
25 chance to get specific. And we really need specifics,

1 frankly, on him about this alleged coercion anyway.

2 THE COURT: All right. So then we're going to
3 have the --

4 MR. KAPLAN: No problem.

5 THE COURT: I'm sorry.

6 MR. KAPLAN: No problem, Judge. We'll --

7 THE COURT: Okay.

8 MR. KAPLAN: -- have -- the witnesses are here now
9 and they will be here tomorrow.

10 THE COURT: Okay.

11 MR. KAPLAN: So the only question is when.

12 THE COURT: Well, we have a --

13 MR. KAPLAN: And Ms. Stiefel is only available
14 Friday at 1:00, so if we could know that we start at one and
15 then we'll follow with Mr. Romallo and the others, that's --

16 THE COURT: Well, I mean, I think --

17 MR. KAPLAN: -- that's fine.

18 THE COURT: -- the problem that we have is that
19 how long on the stipulation where the pro se's allocated,
20 the entire day? Twenty minutes per person, right?

21 MR. MILLER: Twenty minutes per person and there
22 was a time block that everyone understood that was somewhat
23 flexible, I think.

24 THE COURT: Okay. Well, I suppose what we're
25 going to have to do is we will start at 10:00. We will

1 start with whoever the pro se's are that are here. We will
2 get through as many of them as we can until 12:00, and then
3 we're going to have to take a lunch break and then we're
4 going to have to come back at one in order to accommodate
5 the -- Ms. Stiefel's schedule, and then we're just going to
6 have to finish the pro se's after that if more than, doing
7 the math, six of them are here. Is that alright with
8 everyone?

9 I mean, I -- I assume they counseled for the
10 represented claimants -- well, let me ask the question. Is
11 it your intention to -- let me step back.

12 The pro se claimants have an expectation that
13 they're going to be given the microphone to speak in the
14 nature of testimony and/or argument?

15 MR. MILLER: It's up to Your Honor as to how you
16 would like to have the pro se claimants proceed, of course.
17 I think Judge Peck wanted them to have --

18 THE COURT: A chance to be heard.

19 MR. MILLER: -- some chance to be heard. And,
20 obviously --

21 THE COURT: Right.

22 MR. MILLER: -- they're both in the role of lawyer
23 and --

24 THE COURT: Exactly.

25 MR. MILLER: -- (indiscernible). I think it's

1 helpful to know which role they're in.

2 THE COURT: Right. Well, I would --

3 MR. MILLER: And so --

4 THE COURT: -- what -- I mean, just to give the
5 attorneys a head's up, what I've done in the past with pro
6 se claimants is to indicate to them that for their -- the
7 purposes of their presentation they are under oath and their
8 statements will be treated as testimony given under oath.
9 And then they talk.

10 So -- and then to the extent that one of you
11 wishes to question them, I suppose then we can then have
12 them take the witness stand and you can ask them questions
13 in the nature of cross-examination.

14 MR. MILLER: Yes, Your Honor. I -- we would like
15 -- we --

16 THE COURT: I mean, if you have a preferred
17 procedure I'm happy to hear it.

18 MR. MILLER: That's fine with us, Your Honor.

19 We would like to get a clarification from Mr.
20 Schager and make sure we -- at least as to how many
21 witnesses he's planning to call and that schedule. That's
22 still --

23 THE COURT: So are those the only two Neuberger
24 witnesses, Mr. Romallo and Ms. Stiefel?

25 MR. KAPLAN: And Mr. Reynolds we would keep very

1 brief.

2 THE COURT: Okay. So we're -- so that in total, I
3 think, we're talking about perhaps only an hour, recalling
4 that originally this was all supposed to have been done
5 within a three-hour time frame.

6 MR. KAPLAN: Yeah. I mean, I don't -- certainly.
7 I mean, I don't know how -- it depends on the cross-
8 obviously, it depends on the cross-examination. But direct
9 shouldn't -- I mean, I was trying to avoid the direct, but
10 the direct --

11 THE COURT: I understand.

12 MR. KAPLAN: -- shouldn't be long. Right.

13 THE COURT: Okay. All right. So any others that
14 you were intending to call?

15 MR. SCHAGER: Your Honor, a footnote on Mr.
16 Reynolds if I might. I just don't want to waive this. Mr.
17 Reynolds was designated as a rebuttal witness and we were
18 told that he is being called because he is going to bolster
19 the testimony of Mr. Romallo.

20 We would like to reserve our objection. We don't
21 think he was timely designated and we don't think calling a
22 witness to bolster the testimony of another witness is
23 appropriate.

24 THE COURT: Okay.

25 MR. KAPLAN: Well, it -- it's not so much as to

1 bolster the witness as to -- as it is to bolster Mr.
2 Romallo's testimony about his -- about the inducement and
3 threats from Ms. Kreiger (ph). But --

4 THE COURT: But that --

5 MR. KAPLAN: -- also the threats and the
6 inducements that Mr. Reynolds received. It is both.

7 THE COURT: Okay. But that's not a rebuttal --

8 MR. KAPLAN: He --

9 THE COURT: That's not a rebuttal witness. You're
10 not rebutting anything. You are putting in something in
11 further support of --

12 MR. KAPLAN: It was -- well, he was designated a
13 rebuttal witness because it was after Mr. Miller indicated
14 that he wished to cross examine Mr. Romallo notwithstanding
15 that we had given the declarations as his direct. And only
16 --

17 THE COURT: Still --

18 MR. KAPLAN: -- because they were going to cross-
19 examine Mr. Romallo that we needed -- that we wanted to call
20 Mr. Reynolds to testify to the similar state of facts that
21 he experienced.

22 THE COURT: It's still not rebuttal. It's still
23 not rebuttal. I mean, it -- in a normal -- more normal case
24 you would identify somebody who you may call as a rebuttal
25 witness. But, frankly, before you have an opportunity to

1 hear their cross-examination I find it hard to understand
2 how you know what you're rebutting.

3 MR. KAPLAN: Well --

4 THE COURT: I mean, it sounds like you just didn't
5 designate Mr. Reynolds in the first round and then thought
6 better of it.

7 MR. KAPLAN: No. It was only after Mr. Miller's
8 -- Mr. Miller filed his objections saying, I object to Mr.
9 Romallo's statement that I am aware that others, including
10 Christian Reynolds, were similarly solicited by Ms. Kreiger
11 that I indicated that we wanted to call Mr. Reynolds. Only
12 because that's what their objection was; that it was hearsay
13 when Mr. Romallo said it.

14 If there were -- had been no objection, then there
15 would be no need to call Mr. --

16 THE COURT: That's not rebuttal. That's simply
17 that you offered something that LBHI identified as hearsay
18 and then you decided that you had to call somebody else to
19 prove the point that you might not be able to prove out of
20 that witness's mouth. That's not rebuttal. That's you
21 should have designated Mr. Reynolds in the first round.

22 MR. KAPLAN: So are you precluding his testimony?

23 THE COURT: Unless you can do a better job of
24 convincing me that it's rebuttal in the sense -- in the way
25 that trial lawyers use that term, I'm going to preclude you

1 from calling him as a witness.

2 MR. KAPLAN: Well, then I have to wait to see what
3 the cross-examination is.

4 THE COURT: I think you do.

5 MR. KAPLAN: Okay.

6 THE COURT: All right. Let's try to finish up.
7 What other witnesses are you intending to call
8 tomorrow?

9 MR. SCHAGER: Thank you, Your Honor.

10 Well, you can understand that I know what the
11 evidentiary procedures order was because for the represented
12 claimants I was the principal responder on that.

13 THE COURT: Okay. Are you about --

14 MR. SCHAGER: And I drafted something --

15 THE COURT: -- to overrule me?

16 MR. SCHAGER: No, not at all. Not at all.

17 (Laughter)

18 MR. SCHAGER: But about nine months ago I proposed
19 an accelerated procedure and we got an accelerated procedure
20 in the order, but we didn't accelerate very much. And now
21 we're up against this three-hour deadline --

22 THE COURT: But I'm giving you relief. I've -- we
23 are heading into our fifth hour of your three hours --

24 MR. SCHAGER: Let me tell you what I need, Your
25 Honor, what I would like to have -- my goal as a minimum was

1 to have one representative or one illustrative plaintiff
2 from each of three groups. I outlined that.

3 THE COURT: Right.

4 MR. SCHAGER: And I think it is very important for
5 the Court to walk through what the situation was of the
6 commissioned sales person. But, unfortunately, the guy who
7 I have who is Mr. Nicholas P. Howard who is here today, he's
8 not available tomorrow.

9 I've got a fourth witness who was attacked in the
10 briefing and she would like to offer some clarification.

11 THE COURT: Well, why didn't you call that
12 gentleman today instead of the witnesses that you did call?

13 MR. SCHAGER: Well, Mr. Graham was only available
14 today and it was the hour and he can't testify during the
15 working day in London. And Ms. Richmond was the predominant
16 illustration because --

17 THE COURT: Okay.

18 MR. SCHAGER: -- she is the salary bonus person
19 and --

20 THE COURT: Sure.

21 MR. SCHAGER: -- of the 52 people I represent
22 here, 45 of them are salary bonus people.

23 THE COURT: Okay.

24 MR. SCHAGER: And I thought her situation should
25 be highlighted. That is --

1 THE COURT: Okay.

2 MR. SCHAGER: -- the logic, Your Honor.

3 THE COURT: All right. But --

4 MR. SCHAGER: And she covered a lot of ground and
5 I think Nicholas Howard could covered what he has to say and
6 --

7 THE COURT: But I can't --

8 MR. SCHAGER: -- under a half an hour.

9 THE COURT: -- I can't solve -- I can't solve this
10 problem because you -- you're -- we're completely ignoring
11 the fact that the group negotiated for three hours and under
12 anyone's -- even accounting for the fact that I talk too
13 much, we're way over that allotted time. So you had to have
14 made a choice about -- among all of you among which
15 witnesses that you call.

16 So now we're going on almost five hours, plus it
17 sounds like we're going to be doing a good three hours
18 tomorrow. So, you know, five plus three is eight minus one
19 on account of me, that's more than 100 percent of -- more of
20 time than you allotted.

21 So I -- at some point the procedural unfairness of
22 it begins to become a real issue. I mean, there's latitude
23 and then there's just completely ignoring what you
24 negotiated. So I can't do anything about the fact that he's
25 not available tomorrow. Arguably, there wasn't enough time

1 anyway.

2 So who else do you have?

3 MR. SCHAGER: Those two, Your Honor, Nicholas
4 Howard and Karen Kreiger.

5 THE COURT: Okay. So is Ms. Kreiger available?
6 She's available tomorrow from 1 to 2. I'm sorry. Is it
7 Kreiger or Stiefel from one to two?

8 MR. KAPLAN: Stiefel is from one to two.

9 THE COURT: Okay. And Ms. Kreiger is available
10 tomorrow?

11 MR. SCHAGER: Ten o'clock.

12 MS. KREIGER: (Indiscernible).

13 MR. SCHAGER: Nicholas Howard is not available
14 tomorrow.

15 THE COURT: Well, but this is the point that I
16 made. We have -- your identifying all in seven witnesses:
17 Three Neuberger and four of yours. So if we were doing this
18 in the three hours you would have had to all argue and do
19 seven witnesses. It's not possible. So something had --
20 there was not adequate planning or coordination.

21 So I can't fix that. And I can't -- and I think
22 it's not fair to just say, notwithstanding that the stip
23 gave you three hours, you're just going to have unlimited
24 time.

25 MR. SCHAGER: Well, Your Honor, I respect that

1 analysis and, believe me, I know because I wrote it.

2 THE COURT: I hear you.

3 MR. SCHAGER: But --

4 THE COURT: But --

5 MR. SCHAGER: -- but the -- there are two
6 considerations there that could come into play. One is
7 that, with all due respect, Lehman never wanted to put on
8 any witnesses that we had contemplated.

9 The second factor that we need to take into
10 account is Your Honor's old statement; that talking with
11 real people means an awful lot as opposed to looking at
12 declarations or, let's say, frankly, you might be listening
13 to the lawyers arguing.

14 So these are the people who have experienced the
15 plan. They know how it was administered regardless of what
16 the boiler plate was. They know how it was administered and
17 how it affected them. And their views on this are the most
18 critical thing going on in the courtroom today. And I know
19 that there was three hours there. The third factor is that
20 we had some internal arrangements that, frankly, were not
21 respect.

22 So I've only taken, I think, about an hour with
23 the two witnesses that I put on, if even that much. I know
24 the clock reads otherwise, but between Mr. Graham -- and I
25 am grateful for the Court's forbearance there -- and Ms.

1 Fleishman, we haven't had as much time as collectively --

2 THE COURT: Well, look --

3 MR. SCHAGER: -- as the claimants' group had
4 planned on.

5 THE COURT: Here's -- we're going to have to be a
6 little flexible tomorrow because we don't know how many pro
7 se's are going to be here. And I think that if they come
8 and they want their 20 minutes, they should get their 20
9 minutes, all right, because --

10 MR. SCHAGER: Absolutely.

11 THE COURT: -- that's the deal for them. And then
12 we will take a break at noon and then we will restart at one
13 and we will be done, subject to the additional number of pro
14 se's, we'll keep going until five o'clock and then -- and
15 then the record is going to be closed. The evidentiary
16 record is going to be closed.

17 And Mr. Miller is probably very unhappy with me
18 because it effectively increases your time by 100 percent,
19 but I'm not going to be in the position of having anyone say
20 that their due process rights were, you know, somehow
21 violated because they didn't have sufficient time to present
22 their claims, notwithstanding the existence of a stipulation
23 heavily negotiated that allotted you three hours. That's
24 just not the way I operate.

25 So that's what we're going to do. All right.

1 Yes, ma'am.

2 MS. GINZBURG: Your Honor, may I move to the
3 microphone so you can hear me?

4 THE COURT: Sure.

5 MS. GINZBURG: Thank you.

6 Good afternoon, Your Honor. Margarita Ginzburg
7 from Day Pitney. We represent Fabio Lioti (ph) and my
8 partner, Dan Caraga (ph) was at the pretrial conference last
9 Thursday.

10 I just wanted to raise one very quick procedural
11 point with respect to closing arguments. Mr. Caraga
12 understood that he could appear to make his closing argument
13 on Thursday.

14 THE COURT: Yes.

15 MS. GINZBURG: He reserved ten minutes. I just
16 want to make sure that that's --

17 THE COURT: He's very welcome.

18 MS. GINZBURG: Okay.

19 THE COURT: All right.

20 MS. GINZBURG: Thank you very much.

21 THE COURT: Thank you. Okay. All right. Is
22 everybody clear on what we're doing tomorrow?

23 MS. SOLOMON: Your Honor, I just wanted to make a
24 point that there was one hour reserved for the represented
25 participants at closing on Thursday. So I would take it,

1 then, is that ten minutes in addition to the hour?

2 THE COURT: I don't know. I don't know, but it's
3 ten minutes. So let's not spend ten minutes talking about
4 it. So --

5 MS. SOLOMON: Okay. Very good.

6 THE COURT: -- we'll give that party their ten
7 minutes and not deduct it from the hour. Okay.

8 MS. SOLOMON: Thank you.

9 MS. GINZBURG: Thank you, Your Honor.

10 THE COURT: All right.

11 MR. SCHAGER: Your Honor, I don't want to stretch
12 your patience and I probably have already. Mr. Howard --

13 THE COURT: You --

14 MR. SCHAGER: -- is available --

15 THE COURT: You haven't.

16 MR. SCHAGER: -- for 20 or 30 minutes tonight.

17 And I think the Court would find the testimony useful if
18 it's a -- I would offer it, but it's --

19 THE COURT: Mr. Miller.

20 MR. MILLER: We'll suit the Court's pleasure. I
21 mean, we've --

22 THE COURT: All right.

23 MR. MILLER: -- certainly got time for it.

24 THE COURT: All right. Twenty minutes it is.

25 MR. SCHAGER: We would like to call Nicholas

1 Howard, please.

2 THE COURT: Would you raise your right hand,
3 please, sir?

4 (Witness sworn)

5 THE COURT: Please have a seat.

6 DIRECT EXAMINATION

7 BY MR. SCHAGER:

8 Q Mr. Howard, thank you for your patience and your
9 participation today. Could you state your name for the
10 record, please?

11 A It's Nicholas Howard.

12 Q And, Mr. Howard, when did you come to work at Lehman?

13 THE COURT: Can I just -- I'm sorry to interrupt.
14 I'm really trying very hard to keep up with what you folks
15 are doing. But was Mr. Howard on the witness list?

16 MR. SCHAGER: Your Honor, originally we schedule
17 -- we proposed a commissioned sales person named Michael
18 Petrochelli (ph) and he was --

19 THE COURT: Okay.

20 MR. SCHAGER: -- going to appear by telephone, but
21 given the Court's rules and Lehman's -- or Mr. Miller's
22 letter to the Court, we checked around and Mr. Howard is
23 substituted for Mr. Miller --

24 THE COURT: Okay.

25 MR. SCHAGER: -- for Mr. Petrochelli.

1 THE COURT: All right. I'm sorry. I just must
2 have missed that back and forth.

3 (Pause)

4 THE COURT: But there's a declaration of Mr.
5 Howard.

6 MR. SCHAGER: That's correct, Your Honor.

7 THE COURT: Okay. So the testimony is now going
8 to be in addition to the declaration?

9 MR. SCHAGER: Yes, Your Honor. That was my
10 intention and I'll give you a reason why. It's -- obviously
11 --

12 THE COURT: I just -- you know --

13 MR. SCHAGER: The declaration --

14 THE COURT: -- I'm trying very hard to be patient,
15 but I just don't understand what's going on at this point.
16 Why do I have a declaration -- Mr. Miller, could -- do you
17 want to help --

18 MR. MILLER: Your Honor --

19 THE COURT: -- me out here?

20 MR. MILLER: Pardon me.

21 THE COURT: Can you clarify what's going on for
22 me, please?

23 MR. MILLER: Your Honor, LBHI did not object to
24 this declaration.

25 THE COURT: Okay.

1 MR. MILLER: So we don't know why he now wants to
2 call a witness --

3 THE COURT: Well, that -- that's what my confusion
4 is. We -- you didn't object to the declaration so the
5 declaration is in. So, therefore, it would seem to me that
6 the only thing that there should be is the option with Mr.
7 Miller of cross-examining this declarant. I don't
8 understand why I have a declaration not objected to and I'm
9 going to hear testimony. I just don't understand.

10 MR. SCHAGER: I would say, I'm pretty sure, Your
11 Honor, under the evidentiary procedures order the offering
12 of the declaration was not a waiver of a right to examine
13 the witness. I know it's unusual, but --

14 THE COURT: No. I --

15 MR. SCHAGER: -- that was the --

16 THE COURT: No. I -- I'm not -- that's not my
17 point. My point is just, you know, the notion that this was
18 going to somehow be a streamline process is now -- has just
19 gone completely by the boards.

20 So why don't you just ask your questions?

21 (Pause)

22 MR. SCHAGER: I'll do it as quickly as I can, Your
23 Honor --

24 THE COURT: Very good.

25 MR. SCHAGER: -- and I --

1 THE COURT: Go ahead.

2 MR. SCHAGER: And I would ask the Court's
3 permission to approach the witness and hand him --

4 THE COURT: Yes.

5 MR. SCHAGER: -- Exhibit CLX-88.

6 THE COURT: Okay.

7 MR. SCHAGER: And I will offer it to the Court if
8 the Court doesn't have it.

9 THE COURT: Please.

10 (Pause)

11 BY MR. SCHAGER:

12 Q Mr. Howard, good afternoon. We'll be as quick as we
13 can and thank you again for your forbearance.

14 Can I take you to -- can I ask you to look at page
15 9 of 20 at the top of what I've given you as CLX-88?

16 A Page 9?

17 Q That's the page entitled, proof of claim at the top.

18 A Oh, okay.

19 Q And we're going to do this in a shorthand version, Mr.
20 Howard, but is it correct to say that the handwriting on the
21 form is your handwriting and the rest of the form was on the
22 form when it was given to you?

23 A That's correct.

24 Q So it was Lehman who told you to file as a Schedule G
25 executory contract claim, correct?

1 A Correct.

2 Q Okay. May I -- again, accelerating the process I would
3 like to ask you to look at page 15 of 20 of CLX-88.

4 MR. SCHAGER: Your Honor, I will note in the
5 record that we have a similar form in the record already.
6 It was attached to the faxed stipulation agreed to by the
7 parties.

8 THE COURT: Okay.

9 MR. SCHAGER: Okay. So this is just Mr. Howard's
10 individual circumstance, but it goes across the board to all
11 the commissioned sales people.

12 THE COURT: Okay.

13 BY MR. SCHAGER:

14 Q Mr. Howard, sorry. Before we get to the form, when did
15 you come to work at Lehman Brothers?

16 A February 1993.

17 Q And what was your position when you came there?

18 A Managing director.

19 Q Okay. And you were still there at the time of the
20 bankruptcy, correct?

21 A Correct. Yes.

22 Q And what was your position at Lehman Brothers during
23 the years 2003 to 2008?

24 A I was managing director in the commissions paid sales
25 group.

1 Q And at one point you were a sales manager for the
2 commission-paid sales group; is --

3 A I was.

4 Q -- that correct?

5 A Yes. Correct.

6 Q And when did that position end?

7 A Early 2003.

8 Q Early 2003.

9 A Yeah. Correct.

10 Q So for 2003 to 2008 you were a commissioned sales
11 person?

12 A Correct. Yes.

13 Q Okay. Thank you.

14 What I've pointed out to you on page 15 of 20 of
15 CLX-88, Mr. Howard, is that form familiar to you?

16 A It is. Yes.

17 Q Did you receive those every year?

18 A I did.

19 Q Did you receive them more often than once a year?

20 A We actually received these on a monthly basis.

21 Q On a monthly basis.

22 A Yeah.

23 Q Okay. Thank you.

24 I would like to direct your attention to -- well,
25 let's go to the right-hand side just for purposes of

1 identification. The first entry on that form called, year
2 total, \$719,000, can you tell me what that number is?

3 A Yeah. That is the gross production number. And what
4 does that mean? It means the amount of commissions that
5 were generated by myself in that month, in December,
6 December '07.

7 Q And the line below it is called net -- sorry. Two
8 lines below that is average rate. Is that the basis of your
9 compensation --

10 A Correct.

11 Q -- the average rate?

12 A That's a 13 percent payout on the 719,000 produced.

13 Q Okay. And where does that number show up in the --
14 sorry. Where does that 13 percent figure show up on the
15 form as your monthly income?

16 A Well, it shows up on this form on the third line.

17 Q Great.

18 A Well, that's the percentage and then if you drop down
19 three or four lines to go to, total sales compensation, you
20 get that -- that's the total sales compensation number. And
21 that's broken into two parts: One is the cash commissions,
22 which is what I received at the end of each month on a gross
23 basis before taxes; and then the second piece is the cash
24 that was held back that would be held for the next five
25 years and would then be used to buy the restricted stock

1 units, which would then convert into stock.

2 Q Now that's the line you're referring to as the equity
3 accrual calculated, correct?

4 A Correct. Yes.

5 Q Okay.

6 A The way this worked was that the commissioned salesmen
7 would receive 13 -- in that month I received 13 percent of
8 the total production and that was broken into Item 1, cash
9 commissions that I actually directly received right then.
10 That was the cash that was received in -- by Lehman. So
11 Lehman would receive in 719 -- sorry. I would generate
12 719,000 of commissions for Lehman. Lehman would pay me 13
13 percent of that, which totaled the cash -- which was the
14 cash commissions and also the line which is known as equity
15 accrual calculated. That was also cash commissions, but it
16 was being held over for the next five years until conversion
17 date. But it was actual -- it was -- you know, that was
18 real cash that went -- that came to Lehman and then I got a
19 percentage of it.

20 Q Okay.

21 A And then Lehman held a smaller percentage of that for
22 the five-year period.

23 Q Okay. Let me ask you to explain that to the Court. If
24 you've got a million-dollar sale --

25 A Yeah.

1 Q Sorry. Let me withdraw that and ask what sales
2 business did you do?

3 A Well, I was in the equity sales business and I did --
4 an easy example for the Court would be if -- let's just say
5 Client X, Client X purchased a million dollars worth of
6 General Motors. The commission on that -- let's again keep
7 it easy -- would be 100,000 to Lehman. It wasn't 100,000,
8 but let's just for the sake of explaining it easily it was
9 100,000. The salesman would get -- again, to keep it easy
10 -- we'll say he would get ten percent. Five --

11 Q I'm going to interrupt you and ask, the ten percent was
12 an agreed upon rate between you and Lehman?

13 A Yes. I mean, I'm just simplifying it. As you see --

14 Q Right.

15 A -- on the sheet it was actually 13 percent in December
16 of '07.

17 Q And that was written down between you and Lehman that
18 your commission was 13 percent or ten percent in your
19 illustration?

20 A It would vary depending on the product mix that the
21 salesman sold. But that -- you know, the calculation that
22 month it came out to 13 percent. So, you know, there was an
23 agreement that certain percentages would be paid on those
24 commissions. And, you know, it just happened that the
25 average that month was 13 percent. The next month may have

1 been a little higher, may have been a little lower. But it
2 was in that sort of band, sort of ten to 15 percent band,
3 and just depending on the product mix.

4 Q I'm sorry. I interrupted you.

5 A So -- yes. So if the commission was 100,000, the
6 agreement would be that the salesman would get ten percent
7 of it. Ten percent would be \$10,000. How would that be
8 paid? A percent -- part of that would be paid at the end of
9 the month directly out in cash and the remaining cash would
10 be held at Lehman Brothers until it was paid out five years
11 later through --

12 THE COURT: When you say --

13 THE WITNESS: -- through the restricted units.

14 THE COURT: When you say remain in cash, you're
15 referring to the line on the schedule that says equity
16 accrual calculated, correct?

17 THE WITNESS: Yes. I am. Yeah.

18 THE COURT: Thank you.

19 THE WITNESS: But if you think in terms of what
20 happened, Judge, it was actually cash that was actually --

21 THE COURT: Thank you.

22 THE WITNESS: -- made --

23 THE COURT: Okay.

24 THE WITNESS: -- or generated.

25 BY MR. SCHAGER:

1 Q Mr. Howard, I noticed that --

2 THE COURT: Can I just interrupt you one more
3 time?

4 MR. SCHAGER: Please do.

5 THE COURT: So for calendar year 2007, then, your
6 total cash compensation, the numbers are a little blurry. I
7 can't tell if that's a six or an eight, 769,331 or 789,331,
8 correct?

9 THE WITNESS: I'm not quite sure where you're
10 looking at, Judge.

11 THE COURT: I'm on page 7 --

12 THE WITNESS: Okay. Page 7.

13 THE COURT: -- isn't that where you're looking?

14 MR. SCHAGER: Well, that's the --

15 THE WITNESS: This is this page, yes?

16 MR. SCHAGER: Yeah. That's --

17 THE WITNESS: That's the month, Judge, of December
18 --

19 THE COURT: And I have it -- on the far left it
20 says year total.

21 THE WITNESS: Ah, yeah. The year total. Yeah.

22 THE COURT: Do you see the year total?

23 THE WITNESS: Yeah. That's --

24 THE COURT: Right.

25 THE WITNESS: -- that's December to December,

1 correct. Yeah.

2 THE COURT: Yes. So for 2007 cash that you
3 actually got was, I can't tell if it's an eight or a six,
4 789,331, correct?

5 THE WITNESS: Correct. Correct. Yes.

6 THE COURT: And the next line, the 362, the equity
7 accrual, that's the RSU component, correct?

8 THE WITNESS: Yes. That -- what I was trying to
9 explain, Judge, was that it was actually cash generated by
10 clients for Lehman Brothers passed through in terms of -- in
11 the form of commissions. That was hard cash that was then
12 set aside to buy the RSUs in five years' time, to buy the
13 stock --

14 THE COURT: That's your --

15 THE WITNESS: -- in five years' time.

16 THE COURT: -- understanding, correct?

17 THE WITNESS: Correct. Yes.

18 THE COURT: Go ahead.

19 BY MR. SCHAGER:

20 Q Well, it -- on your example of a million-dollar product
21 --

22 A Yes.

23 Q -- and a hundred -- a ten percent commission, there's
24 no ambiguity that the client paid that commission to Lehman
25 Brothers, correct?

1 A Correct.

2 Q And there's no ambiguity -- you had an agreement that
3 your commission from Lehman was 13 percent --

4 A Correct.

5 Q -- in -- based --

6 A Yeah.

7 Q -- on the -- on the riding (sic) year?

8 A Yes. Correct.

9 Q Okay. And Mr. Howard, I notice in the equity accrual
10 calculated under December, November, October and September
11 of 2008 there's a zero. I think the answer to that is
12 obvious, but can you explain to the Court why there's a zero
13 there for equity accrual calculated?

14 A Well, that was the month that Lehman went -- you know,
15 filed for bankruptcy. And obviously there was no cash
16 available on the cash commission line and there was no cash
17 available for -- on the equity accrual lines.

18 Q Okay. Now --

19 A And they -- if I can just add, that's because those
20 items were paid out -- calculated and paid out at the end of
21 the month. If you would look up to the top of the month
22 you'll see that before Lehman filed I had actually generated
23 319,000 in commissions. But there was actually no cash to
24 be paid out because there was no cash.

25 Q Okay. Thank you.

1 Was there an RSU program when you went to work at
2 Lehman?

3 A Not in 1993. I don't recall exactly when it was
4 started, but as Ms. Fleishman said it was soon after the
5 IPO. I think it might have been 1996 or something like
6 that.

7 Q Okay.

8 A 1997. But I don't --

9 Q And I won't go too long.

10 A -- precisely recall.

11 Q We're accelerating this and I'm not going to go through
12 all the questions. But you had no choice about
13 participating in the program; is that correct?

14 A Correct.

15 Q Okay. And there was no negotiation about the duration
16 of the five-year period or the portion that would be held --
17 withheld for RSUs --

18 A Correct.

19 Q -- and so forth? Okay.

20 MR. SCHAGER: Now, Your Honor, there's -- at a --
21 an issue here that arises as a result of the partial
22 settlement that was discussed in earlier today and in the
23 hearing, there was a partial settlement of Mr. Howard's
24 claim that I think the Court should understand because it
25 relates directly to an argument that has appeared in the

1 briefs and was eluded to this morning saying, under certain
2 circumstances it might not be an LBHI claim. It would be an
3 LBI claim.

4 And I raise the subject first with the Court
5 anticipating -- well, asking whether there's an objection to
6 my going into that settlement agreement. It's been
7 discussed openly in court and --

8 THE COURT: Well, I don't know what you could
9 possibly ask this witness that would have a bearing on that
10 since it all is after the fact. I don't understand what
11 question you could ask Mr. Howard that would elicit
12 admissible evidence on -- with respect to that point.

13 MR. SCHAGER: Should I offer an explanation or
14 just ask the question?

15 THE COURT: Well, Mr. Miller, do you know where
16 this is going?

17 MR. MILLER: I'm not certain that we're
18 communicating and I'm not certain where he's going. He is
19 not a Neuberger Berman employee.

20 THE COURT: Yes.

21 MR. MILLER: So this doesn't have anything to do
22 with the Neuberger Berman payments.

23 THE COURT: Right. Well --

24 MR. MILLER: You're referring to a settlement.
25 You mentioned LBI --

1 MR. SCHAGER: I'm sorry.

2 MR. MILLER: Okay.

3 MR. SCHAGER: LBHI.

4 MR. MILLER: All right. I'm intimately familiar
5 with the LBHI settlement issue. I wouldn't be familiar with
6 LBI because --

7 THE COURT: Right.

8 MR. MILLER: -- as we all know that's a different
9 --

10 THE COURT: Different case.

11 MR. MILLER: -- a different process.

12 The settlements were supposed to be confidential,
13 but I -- if the Court wants to know what the settlement was
14 that was offered, we're happy to go into it with the Court.
15 But I --

16 THE COURT: I don't --

17 MR. MILLER: -- I don't understand what the
18 relevance is.

19 THE COURT: I don't understand what the relevance
20 is. I just don't understand what the relevance is to -- you
21 put Mr. Howard on to talk about his compensation arrangement
22 and his understanding of it as it occurred in the years
23 leading up to going into bankruptcy.

24 So now you've identified a subject matter that is
25 wholly outside the scope of that and I don't know what this

1 witness could tell me on that subject that I would find
2 admissible or relevant.

3 MR. SCHAGER: Well, that's a question to me, Your
4 Honor, so I'll try answering it --

5 THE COURT: Yeah.

6 MR. SCHAGER: -- and that is that this equity
7 accrual calculating line that we're looking at --

8 THE COURT: Yes.

9 MR. SCHAGER: -- was accrued and this -- it showed
10 on this statement and a portion of that for the 2008 year
11 was paid. And it was paid directly by LBHI. And now that
12 we're encountering an argument that, oh, it's really an LBI
13 obligation, you shouldn't be here, but it's not really an
14 LBI obligation. It's an LBHI obligation. That's -- that
15 would be the subject of the testimony that I would be
16 eliciting. And that's been the subject of one of the other
17 declarations as well.

18 I'm -- I --

19 THE COURT: Why don't you just ask the questions
20 because I'm not -- I'm not at all following what you're
21 saying. So you can just ask the questions.

22 BY MR. SCHAGER:

23 Q Mr. Howard, the year total equity accrual calculating
24 shown on the page that we've been looking at is \$362,9000.

25 A Uh-huh.

1 Q IS that correct?

2 A Correct.

3 Q Okay. Now did you receive a grant of RSUs in 2008?

4 A Yes.

5 Q Do you recall how big it was?

6 A I don't precisely. No.

7 Q Okay. Do you recall a settlement proposal made to you
8 by LBI regarding the 362,000 accrued in 2008?

9 A Yes.

10 MR. MILLER: Excuse --

11 THE COURT: Okay.

12 MR. MILLER: Excuse me. First of all, if that's a
13 settlement at LBI (indiscernible) --

14 MR. SCHAGER: I misspoke. I apologize.

15 MR. MILLER: That's a settlement by LBHI. We
16 would point out that any settlement would be under Rule 408
17 --

18 THE COURT: It would.

19 MR. MILLER: -- and we would object to it as being
20 offered as some sort of admission --

21 THE COURT: Right.

22 MR. MILLER: -- which seems to be what it's being
23 offered for.

24 THE COURT: So that's --

25 MR. MILLER: So if he has some other rule outside

1 of 408 --

2 THE COURT: Right.

3 MR. MILLER: -- you know --

4 THE COURT: That's classic 408.

5 MR. SCHAGER: Classic 408, Your Honor, I agree,
6 except that it was openly discussed in court and I thought
7 it was --

8 THE COURT: When was it --

9 MR. SCHAGER: -- it was relevant. But if --

10 THE COURT: When was it -- no. It was not openly -
11 - when was it openly discussed in court?

12 MR. SCHAGER: In the last conference before Judge
13 Peck.

14 THE COURT: Well, now we're really kind of off the
15 reservation. I was obviously not at the last conference
16 before Judge Peck. So if there was some sort of an explicit
17 waiver of 408 protection of a settlement offer, then I'm
18 going to have to be shown that because what you've just gone
19 into is classic 408, classic, and I would be surprised,
20 although I'm happy to be educated on the point. If someone
21 has a transcript to show me that there was a 408 waiver,
22 then, you know, I can look at that. But you can't --

23 MR. SCHAGER: Withdrawn.

24 THE COURT: -- charge me with knowledge of
25 something that happened before the case was assigned to me.

1 MR. SCHAGER: Withdrawn, Your Honor. I'm sorry to
2 have engaged in the distraction. I thought it would be --

3 THE COURT: Okay.

4 MR. SCHAGER: -- helpful.

5 BY MR. SCHAGER:

6 Q Mr. Howard, one last couple of questions here --

7 THE COURT: I mean, you -- no. Just let me say
8 that, you know, the purpose of 408 is to encourage
9 settlement. And it goes without saying that the Lehman case
10 is of, you know, epic and unprecedented proportions, and
11 that in the course of the five years that it has unfolded,
12 there have been any number of settlements where Lehman is
13 making a cost benefit calculation as it's entitled to do.

14 To take any settlement discussions as evidence of
15 the underlying merits or not of a claim would be wrong in
16 the absence of an explicit waiver of the 408 protection.
17 And on that point I couldn't be more clear.

18 So --

19 MR. SCHAGER: Your Honor --

20 THE COURT: -- I'm going to leave it at that
21 unless somebody wishes to pursue it further.

22 MR. SCHAGER: I have no desire to pursue it
23 further.

24 THE COURT: Okay. All right. Then are you done
25 with this witness?

1 MR. SCHAGER: No. I have one more question.

2 THE COURT: Go ahead.

3 BY MR. SCHAGER:

4 Q And that is, Mr. Howard, how much of your compensation
5 was withheld for equity accrual calculated as of August of
6 2008?

7 A It was -- well, I guess you can see it on the sheets
8 here. For that year the commission percentage was 13
9 percent. And, you know, the back of the envelope
10 calculation, if you go down to the cash commission and the
11 equity accrual piece it's about 30 percent.

12 Q Okay. Mr. Howard, I'm going to refer you to page 13 of
13 20 of this exhibit. That's your handwriting. It's
14 identified at the top, 13 of 20.

15 A Yes.

16 Q Okay. The other Item A-1, you have an entry there in
17 the grid, value of the award units as \$1,980,000. That's
18 the value of your RSU claim?

19 A Correct. Yes.

20 Q Okay. Now that might refresh your recollection, but if
21 you had gone to work for a Morgan Stanley or a Goldman Sachs
22 in January of 2008, what would it have cost you in terms of
23 what you left behind at Lehman?

24 A Well, it would have cost me the 1.9 million that's on
25 the page here.

1 Q Was it really an option to leave Lehman at that
2 expense?

3 A Well, I could have left Lehman, but I would have -- I
4 could have left Lehman and walked away from the 1.9 million
5 or I could have gone to another firm, but, you know, they
6 would have to have come close to matching that otherwise it
7 would have been an uneconomic proposition.

8 Q Did you have any discussions with any firm about hiring
9 on with them and leaving Lehman?

10 A No, I did not.

11 Q Okay.

12 MR. SCHAGER: No further questions, Your Honor.

13 THE COURT: All right. Mr. Miller, any cross-
14 examination?

15 MR. MILLER: Very briefly, Your Honor.

16 THE COURT: Okay.

17 CROSS-EXAMINATION

18 BY MR. MILLER:

19 Q Mr. Howard, you had worked for Lehman, I believe, from
20 1993 through 2008; is that right?

21 A Yes. Correct. February 1993.

22 Q And you -- your compensation was production based for
23 that entire time period?

24 A No, it was not. I was salary bonus up until 2003.

25 Q Till 2003.

1 A Yeah. So from 1993 to the beginning of 2003.

2 Q All right. And you talked about a cash portion in --
3 when we were looking at this page, that is 15 of 20 in the
4 exhibit that's before you.

5 A Yes.

6 Q All of the figures here started out as cash, didn't
7 they, in the sense that they -- that's the way Lehman got
8 paid was cash?

9 A Yes. That's right.

10 Q So the difference between the 13.71 percent and the 100
11 percent, which is in 76.3 percent right, that was also cash
12 that came into Lehman, right?

13 A Could you repeat that, please, sir?

14 Q Yes. Lehman got all of the cash for December '07 with
15 regard to this production commission --

16 A Yes.

17 Q -- that's at the top?

18 A That's right, 719,000, et cetera, yeah. Correct.

19 Q So this amount that you said was equity accrual
20 calculated, that's no more cash than anything else in this
21 column right, or less cash. It was all cash.

22 A It was all cash. Yes.

23 Q It started as cash.

24 A Yeah. It started as cash. Lehman would have received
25 719,000 and they paid to me the -- of the line item that's,

1 I think it's 69,000 and they would -- which they would have
2 received as part of the 719,000. And then they would have
3 held the 25,000, which they would also receive as part of
4 the 719,000.

5 Q All right.

6 A But the 25,000 would have been kept. You know, they
7 would have got -- that was cash that came in. It was then
8 held back to purchase stock at a later date.

9 Q You say it was held back. You don't actually know as a
10 matter of fact what Lehman did with that cash, where it put
11 it, right?

12 A I was not -- no. I -- yeah. It was very, very
13 absolutely, absolutely not. But we do know that it was cash
14 received. What they did with it, which account they would
15 put it into, it presumably would go into a bank account for
16 Lehman Brothers somewhere because that was cash that came
17 into the firm.

18 Q All right. Now starting in 2003 you got monthly
19 production statements; is that true?

20 A Yes. That's correct.

21 Q And each month when you got a production statement it
22 had the equivalent of this line for equity accrual
23 calculated, right?

24 A Yes. That's correct.

25 Q So starting in 2003 you understood every month you were

1 having part of the commission was being put into this equity
2 calculated accrual category, right?

3 A Yes. I knew that. correct.

4 Q And you kept coming back and working month after month
5 after month, right?

6 A Yes. That's correct.

7 Q And you understood you were an at will employee in the
8 sense that if you wanted to quit you didn't have a
9 contractual obligation to work for a certain number of
10 months; is that true?

11 A I was certainly an at will employee. I don't know
12 whether I would have any contractual obligation to be there
13 another month. But it was -- it would be a limited period.

14 Q All right. And you did understand that one of your
15 options personally was that you could go to another firm and
16 say, I have -- I am valuable and if, assuming you met,
17 whatever restricting covenants you could try to get that
18 firm to compensate you for any deferred awards that you
19 might have at Lehman as an inducement to get you to change
20 firms. That was an option you had, right?

21 A That was an option I had. Yeah.

22 Q You chose not to take that option.

23 A Correct. And one thing I will add to that is that that
24 was a limited option because another firm would look at that
25 amount of money that I would have to be paid and that would

1 put them off an employee of Lehman Brothers because the --
2 you know, the money that had been held back that they -- an
3 employee would ask another alternative employer to match
4 would be very substantial.

5 And that's why they were effectively hand -- they
6 were very effective handcuffs because our competitors knew
7 that if they were going to try and bid away our best people,
8 they were going to have to pay a lot of money to do that.
9 So effectively it became a very effective way of keeping
10 people from leaving the firm.

11 Q Do you know if any other firms in the industry had
12 similar deferred compensation programs?

13 A Some did, but many didn't.

14 MR. MILLER: I have no further questions, Your
15 Honor.

16 MR. SCHAGER: One quick follow up, Your Honor.

17 THE COURT: Go ahead.

18 REDIRECT EXAMINATION

19 BY MR. SCHAGER:

20 Q Mr. Howard, when you referred to the hiring firm hiring
21 an employee and having that expense to look at, would the
22 hiring firm be looking at the market share of the RSUs --
23 sorry -- the market share of the stock underlying the RSUs
24 or the grant value?

25 THE COURT: You don't mean the market share.

1 THE WITNESS: Market value you mean.

2 THE COURT: You mean the market price.

3 MR. MILLER: Objection, Your Honor. Foundation.

4 I don't know how he can know what another firm would be
5 looking at.

6 THE COURT: Don't --

7 MR. SCHAGER: That was the question that -- I was
8 just following up on the last question that was asked, Your
9 Honor.

10 THE COURT: Well, he -- the statement was made
11 that -- the statement was made that the reason that he had
12 to stay at the firm was because it would be too costly to
13 leave, right? So he doesn't -- I don't think there's any
14 foundation for knowing how the other firm would calculate
15 it. But the better question, frankly, is when you saw this
16 amount being accrued, at what price did you think it was
17 going to convert into stock? How did you think that --

18 THE WITNESS: Well --

19 THE COURT: -- that number --

20 THE WITNESS: Yes.

21 THE COURT: -- so a year end of -- at December to
22 December 2008 the equity accrual number is \$362,000.

23 THE WITNESS: Correct.

24 THE COURT: Then what would happen if the Lehman
25 stock price went down, all right, after that date?

1 THE WITNESS: Yeah.

2 THE COURT: Would you still be entitled to
3 \$362,000 of Lehman stock or did you get a grant of Lehman
4 stock in the amount of \$362,000 on that date and you would
5 follow the stock price down as it went down?

6 THE WITNESS: From my memory, Your Honor, what I
7 would look at would be the at the end of, for example, '08,
8 if the firm had still been --

9 THE COURT: Right.

10 THE WITNESS: -- in business, I would -- you know,
11 the documentation that would come to me would be the --
12 there was going to be \$362,000 worth of cash would be
13 translated into so many units. Those units -- I would be
14 eligible for those units in five years' time.

15 THE COURT: At what price? How many -- how would
16 you calculate the number of units?

17 THE WITNESS: Well, if you go to --

18 THE COURT: It would be --

19 THE WITNESS: Can I refer you to another page on
20 here?

21 THE COURT: Sure.

22 THE WITNESS: Yeah. If you go to page, what it
23 is, 14 of 20, Your Honor, you will see the same that's
24 referred to as the -- you know, as the grant price and the
25 grant value. The grant price would be, from memory what --

1 what it was when --

2 THE COURT: But --

3 THE WITNESS: -- you received the -- yeah. When
4 you received the --

5 THE COURT: That's right.

6 THE WITNESS: -- strike.

7 THE COURT: Right.

8 THE WITNESS: Yeah.

9 THE COURT: Right. And then once it matures, that
10 -- the value -- then there's a column that says grant value.

11 THE WITNESS: Yeah. So the --

12 THE COURT: Right.

13 THE WITNESS: -- grant value for 2008, Your Honor,
14 if the firm --

15 THE COURT: It's just --

16 THE WITNESS: -- had still been in business would
17 have been \$362,000 at whatever the -- you know, if the firm
18 had been in business at \$20 a share --

19 THE COURT: Right.

20 THE WITNESS: -- that would have been the grant
21 price.

22 THE COURT: Right. But then -- then later on if
23 all had gone -- if Lehman had continued in business, that
24 block of stock that had a value of 362 at the time of the
25 grant would be worth more or less depending upon --

1 THE WITNESS: Correct.

2 THE COURT: -- what the Lehman share price did in
3 those ensuing years, right?

4 THE WITNESS: Correct. Yes.

5 THE COURT: Okay. Okay.

6 Yes, Mr. Miller.

7 MR. MILLER: I just had one follow up question.

8 THE COURT: Go ahead.

9 CROSS-EXAMINATION

10 BY MR. MILLER:

11 Q With --

12 MR. MILLER: May I --

13 THE COURT: Yes.

14 Q With regard to this page you just called the Court's
15 attention to, Mr. Howard, this right column is cut off. Do
16 you see that?

17 A On 14 of 20?

18 Q Yes.

19 A It is. Yeah. Yeah.

20 Q I notice that this shows as of August 31st, 2008. Do
21 you see that?

22 A At the top, yes. I see that. Yeah.

23 Q Was this market value as of August 31st, 2008?

24 A Yeah. That was -- that would have been the market -- I
25 think, I think, I'm pretty sure that's what it would have

1 been because --

2 Q Okay.

3 A -- August -- by August the 31st the stock was a very
4 low price.

5 Q So this appears to be the market value that's been cut
6 off on this page at 14 cents and a fraction a share?

7 A That's correct.

8 Q So I assume if we expanded that out to the market value
9 we're going to see that it's a very low relative total; is
10 that right?

11 A Yes.

12 Q Do you have any --

13 A On August the 31st it was a low price.

14 Q Do you have any idea of what that is? The 63
15 something, is that thousands? That's certainly not
16 millions, at the bottom.

17 A That is a very low number so I would think it's six --
18 6863 or something like that.

19 Q All right.

20 A Six -- 6,000. Yeah.

21 Q So each year when you got this one of the things it
22 calculated was it calculated the market value of those units
23 at that date; is --

24 A Correct.

25 Q -- that right?

1 A Yes. That is correct.

2 Q So you could track those units as they progressed
3 toward the five-year mark?

4 A Yeah.

5 Q And at this point the value had dropped to under
6 \$10,000, for all --

7 A Correct. Yes.

8 Q You do understand that this motion is going to allow
9 you to still have whatever value those units have if they
10 were stock. Did -- do you understand that?

11 A Yes. If it was stock, but my -- I think my argument
12 I'm making here, I think we're making, is that that we were
13 owed the cash that had been accrued, clearly accrued under
14 that other page in the documents we've seen here. That was
15 money owed. And that money owed would -- was -- would be
16 held at Lehman and put -- the stock would be purchased five-
17 years out.

18 Q Can you direct the Court or us to any written document
19 that had ever told you that you were going to have the
20 option to get cash instead of this stock if Lehman -- if the
21 stock got to be very valueless?

22 A Was there any documentation?

23 Q Yes. Do you have any documentation where anybody ever
24 said, if the stock goes down in value, we'll give you the
25 cash that was -- that the -- the cash accrual calculated --

1 let me get the right term. I'm sorry; that you could get
2 the equity accrual calculated as cash if the stock price
3 dropped? Did you ever see that --

4 A I think it was well understood that the RSUs were
5 looked at as IOUs. That was money owed to the employees.

6 Q But weren't they IOUs for stock? They were -- that you
7 were owed stock, common stock?

8 A They were IOUs for the cash that was -- had been
9 generated by the sales people and was being held at the firm
10 for the use down the road to run the business and also
11 including to pay out the stock that was owed to the
12 employees under the documentation.

13 Q And can you point us to any written statement of that
14 -- to that effect; that this was a cash amount that was owed
15 to the employees?

16 A I think it was understood that it was a cash -- there
17 was cash that was -- it was owed to the employees until it
18 was converted -- until there was a conversion five years
19 out.

20 Q Okay.

21 MR. MILLER: I pass the witness, Your Honor.

22 THE COURT: All right. We're going to be done for
23 today.

24 Thank you, Mr. Howard. You can step down.

25 THE WITNESS: Thank you.

1 THE COURT: And I'll see you folks at ten o'clock
2 tomorrow morning. You can just tidy up and you can leave
3 your things in here overnight. We'll lock up later. All
4 right.

5 (A chorus of thank you)

6 THE COURT: You can leave your things. Yes.

7 Any -- yes, ma'am.

8 MS. KREIGER: I'm just really confused as to
9 whether I am coming tomorrow or not.

10 THE COURT: I believe that you're coming at 1:00
11 tomorrow. No?

12 MR. SCHAGER: No. This is --

13 MS. KREIGER: I'm not Ms. Stiefel.

14 MR. SCHAGER: -- Karen Kreiger.

15 MR. KAPLAN: She's not Ms. Stiefel.

16 THE COURT: I thought that we agreed that Ms.
17 Kreiger was going to be able to testify tomorrow afternoon
18 subject to the occurrence of having too many pro se's and
19 therefore not enough time.

20 MR. KAPLAN: So we have Ms. Stiefel coming at one.

21 THE COURT: Yes.

22 MR. KAPLAN: I asked Mr. Romallo if he could come
23 -- and he's coming at 11 in case we don't have a lot of pro
24 se's we don't have to waste time.

25 THE COURT: Okay.

1 MR. KAPLAN: So we'll have him as well. If we
2 have -- if he runs over, then we'll put him on after Ms.
3 Stiefel.

4 THE COURT: Okay. And please -- someone tell Ms.
5 Kreiger what you want her to do.

6 MR. KAPLAN: So I guess after --

7 MR. SCHAGER: I thought we had an understanding
8 that she was going to testify at ten.

9 MR. KAPLAN: No.

10 THE COURT: No, we did not. We did not have that
11 understanding. We have the understanding that the pro se's
12 were promised time at ten o'clock and we're going to stick
13 to that.

14 MR. KAPLAN: All right. We have to accommodate
15 the pro se's in the morning and only if they don't -- only
16 if they don't have a lot of pro se's and we have free time
17 we'll be able to put witnesses on.

18 MR. SCHAGER: Well, we'll try to work something
19 out with Ms. Kreiger to have her available.

20 THE COURT: Okay. I'll just say it one more time.
21 At ten o'clock in the morning we're going to start with the
22 pro se's, whoever of them arrive. They were allotted 20
23 minutes each. They're going to have their 20 minutes each.
24 We're going to go until twelve o'clock. By my calculation
25 that means we have time for six pro se's. Then we're going

1 to take an hour lunch, then we're going to resume at one
2 o'clock.

3 And the time in the afternoon is going to be
4 determined -- your time which is 100 percent over the limit
5 you were allocated in the stipulation that was heavily
6 negotiated. The amount of time that you have for your
7 remaining witnesses will be determined by how many
8 additional pro se's we have.

9 All right. Have a good evening.

10 MR. SCHAGER: Thank you, Your Honor.

11 UNIDENTIFIED SPEAKER: Thank you.

12 THE COURT: Thank you, Francis. See you tomorrow.

13 (Proceedings concluded at 6:32 p.m.)

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C E R T I F I C A T I O N S

I, Sheila G. Orms, Dawn South, Nichole Yawn, and Sherri Breach certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: April 3, 2014

Sheila G. Orms

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